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(2000－2003)

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Judicial *Yuan,* Republic of China
September, 2007

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(Grand Justices Council)
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Under Personal Supervision of
Dr. Yueh-Sheng Weng
President of Judicial Yuan
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Justice Lai, In-Jaw
Justice Tzu-Yi Lin
Justice Vincent Sze
Justice Syue-Ming Yu
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J. Y. Interpretation No.499（March 24, 2000）*

ISSUE: (1) May a Constitutional Amendment that has already been passed by the National Assembly and signed by the President nevertheless be unconstitutional due to an inadequate or improper process? If so, to what extent is said process considered inadequate or improper?

(2) May a Constitutional Amendment that has already been passed by the National Assembly and signed by the President nevertheless be unconstitutional because its content is in violation of certain fundamental principles upon which the Constitution is based?

RELEVANT LAWS:

Articles 25, 27, Paragraph 1, Subparagraph 3, 78, 133 and 174 of the Constitution（憲法第二十五條、第二十七條第一項第三款、第七十八條、第一百三十三條、第一百七十四條）; Articles 1, Paragraph 3 of the Amendments to the Constitution（憲法增修條文第一條第三項）; Article 38, Paragraph 2 of the Regulation of the National Assembly Proceedings（國民大會議事規則第三十八條第二項）; Articles 4 and 5 of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第四條、第五條）; J.Y. Interpretation No. 331（司法院釋字第三三一號解釋）.

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* Translated and edited by Professor Andy Y. Sun.

** Contents within frame, not part of the original text, are added for reference purpose only.

KEYWORDS:

anonymous balloting（無記名投票）, bill of no confidence（不信任案）, clearly and grossly flawed（重大明顯瑕疵）, due process（正當程序）, principle of openness and transparency（公開透明原則）, transparency（透明）, Period of National Mobilization in Suppression of Communist Rebellion（動員戡亂時期）, representation by apportionment（比例代表制）, apportionment by way of attachment（依附式之比例代表制）, term extension（延長任期）.**

HOLDING: 1. The Constitution is the fundamental basis for and supreme law of the country. Its amendment greatly affects the stability of constitutional order and the well-being of all people as a whole and, therefore, must be made by the authorized [governmental] body in accordance with constitutional due process. Furthermore, because the process of amending the Constitution is the most direct action that reflects and realizes sovereignty, it must be conducted openly and transparently in order to satisfy the condition of rational communication and, hence, lay the proper foundation for a constitutional state. In accordance with

解釋文：一、憲法為國家根本大法，其修改關係憲政秩序之安定及全國國民之福祉至鉅，應由修憲機關循正當修憲程序為之。又修改憲法乃最直接體現國民主權之行為，應公開透明為之，以滿足理性溝通之條件，方能賦予憲政國家之正當性基礎。國民大會依憲法第二十五條、第二十七條第一項第三款及中華民國八十六年七月二十一日修正公布之憲法增修條文第一條第三項第四款規定，係代表全國國民行使修改憲法權限之唯一機關。其依修改憲法程序制定或修正憲法增修條文須符合公開透明原則，並應遵守憲法第一百七十四條及國民大會議事規則有關之規定，俾副全國國民之合理期待與信賴。是國民大

Article 25, Article 27, Paragraph 1, Subparagraph 3, of the Constitution and Article 1, Paragraph 3, Subparagraph 4, of the Amendments to the Constitution (amended as of July 21, 1997), the National Assembly, which represents and acts on behalf of the entire citizenry, is the sole authorized body with the power to amend the Constitution. The exercise of such power must be based upon the principles of openness and transparency and be in compliance with Article 174 of the Constitution as well as related rules of the National Assembly so as to satisfy the reasonable expectation and trust of the entire nation. As a result, Article 38, Paragraph 2, of the Regulation of the National Assembly Proceedings concerning anonymous balloting should be limited in its application in the readings on constitutional amendments. The act of amending the Constitution shall not take effect if the process is clearly and grossly flawed (Gravitaets-bzw. Evidenztheorie). "Clearly" means [material] facts are so obvious that they can be determined without investigation; "grossly" means, as far as parliamentary procedure is concerned, the flaw is so significant that due process

會依八十三年八月一日修正公布憲法增修條文第一條第九項規定訂定之國民大會議事規則，其第三十八條第二項關於無記名投票之規定，於通過憲法修改案之讀會時，適用應受限制。而修改憲法亦係憲法上行為之一種，如有重大明顯瑕疵，即不生其應有之效力。所謂明顯，係指事實不待調查即可認定；所謂重大，就議事程序而言則指瑕疵之存在已喪失其程序之正當性，而違反修憲條文成立或效力之基本規範。國民大會於八十八年九月四日三讀通過修正憲法增修條文，其修正程序牴觸上開公開透明原則，且衡諸當時有效之國民大會議事規則第三十八條第二項規定，亦屬有違。依其議事錄及速記錄之記載，有不待調查即可發現之明顯瑕疵，國民因而不能知悉國民大會代表如何行使修憲職權，國民大會代表依憲法第一百三十三條規定或本院釋字第三三一號解釋對選區選民或所屬政黨所負政治責任之憲法意旨，亦無從貫徹。此項修憲行為有明顯重大瑕疵，已違反修憲條文發生效力之基本規範。

is no longer present and the basic rule of the constitutional amendment is violated. In its Third Reading on September 4, 1999, in attempting to amend the Constitution, the National Assembly has violated the above-stated principle of openness and transparency.[1] It also contradicted the then- still effective Article 38, Paragraph 2, of the Regulation of the National Assembly Proceedings. Based upon the transcript, there were indeed [material] facts so obviously flawed that they could be determined without investigation. The general public was precluded from realizing how the National Assembly exercised its power to amend the Constitution, and the spirit of the Constitution, which dictates that delegates of the National Assembly be politically responsible for their respective electorate or political party, as incorporated in Article 133 of the Constitution or Judicial Yuan Interpretation No. 331 could not be carried out. As a result,

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[1] Articles 45 to 50 of the Rules of the National Assembly Proceedings require that all bills relating to amending the Constitution must go through the three Readings process. The First Reading is the general introduction of a bill, the Second Reading involves bill mark-up, reviews and substantive discussions/amendments, and the Third Reading is for cosmetic changes (e.g., grammatical correction) only before casting the final vote.

the act to amend the Constitution in question is clearly and grossly flawed and has violated the fundamental rule to render any constitutional amendment effective.

2. The National Assembly is a body installed with, and by the authority of, the Constitution and powers are also bestowed upon it by the Constitution. Although the Amendments to the Constitution have equal status with the constitutional provisions, any amendment that alters the existing constitutional provisions concerning the fundamental nature of governing norms and order and, hence, the foundation of the Constitution's very existence destroys the integrity and fabric of the Constitution itself. As a result, such an amendment shall be deemed improper. Among the constitutional provisions, principles such as establishing a democratic republic under Article 1, sovereignty of and by the people under Article 2, protection of the fundamental rights of the people under Chapter Two as well as the check and balance of governmental powers are some of the most critical and fundamental tenets of the Constitution as a

二、國民大會為憲法所設置之機關，其具有之職權亦為憲法所賦予，基於修憲職權所制定之憲法增修條文與未經修改之憲法條文雖處於同等位階，惟憲法中具有本質之重要性而為規範秩序存立之基礎者，如聽任修改條文予以變更，則憲法整體規範秩序將形同破毀，該修改之條文即失其應有之正當性。憲法條文中，諸如：第一條所樹立之民主共和國原則、第二條國民主權原則、第二章保障人民權利、以及有關權力分立與制衡之原則，具有本質之重要性，亦為憲法整體基本原則之所在。基於前述規定所形成之自由民主憲政秩序，乃現行憲法賴以存立之基礎，凡憲法設置之機關均有遵守之義務。

whole. The democratic constitutional process derived from these principles forms the foundation for the existence of the current Constitution and all [governmental] bodies installed hereunder must abide by this process.

3. On September 4, 1999, the Third National Assembly passed Article 1 of the Amendments to the Constitution, which provides that as of the Fourth National Assembly, its members shall be appointed from among different political parties and proportioned in accordance with the ratio of votes received by each such political party and independent candidates in the election for members of the Legislative Yuan. Such a procedure, which apportions National Assembly membership by each political party with its election outcome for members of the Legislative Yuan, a body different in nature, powers and duties [from the National Assembly], never requires the process of election, and therefore, clearly contradicts the meaning of Article 25 of the Constitution, which states that the National Assembly shall exercise its powers on behalf of all na-

三、第三屆國民大會八十八年九月四日通過之憲法增修條文第一條，國民大會代表第四屆起依比例代表方式選出，並以立法委員選舉各政黨所推薦及獨立參選之候選人得票之比例分配當選名額，係以性質不同、職掌互異之立法委員選舉計票結果，分配國民大會代表之議席，依此種方式產生之國民大會代表，本身既未經選舉程序，僅屬各黨派按其在立法院席次比例指派之代表，與憲法第二十五條國民大會代表全國國民行使政權之意旨，兩不相容，明顯構成規範衝突。若此等代表仍得行使憲法增修條文第一條以具有民選代表身分為前提之各項職權，將牴觸民主憲政之基本原則，是增修條文有關修改國民大會代表產生方式之規定，與自由民主之憲政秩序自屬有違。

tionals. If any such appointed member can nevertheless execute powers and duties under Article 1 of the Amendments to the Constitution, which is premised upon that member being an elected public representative, it contradicts the fundamental principle of democracy and constitutional rule of law. It follows that the provisions concerning the formation of delegates of the National Assembly under the Constitutional Amendments are not in conformity with the constitutional order of freedom and democracy.

4. Article 1, Paragraph 3, of the Amendments to the Constitution states, among other things, "... the term of the Third National Assembly shall expire as of the day the term for members of the Fourth Legislative Yuan expires." Article 4, Paragraph 3, further stipulates, "The term of the Fourth Legislative Yuan expires on June 30, 2002." These provisions extend the term of the Third National Assembly by two years and forty-two days and the Fourth Legislative Yuan by five months. Given the principle of sovereignty of and by the people, the powers

四、上開增修條文第一條第三項後段規定：「第三屆國民大會代表任期至第四屆立法委員任期屆滿之日止」，復於第四條第三項前段規定：「第四屆立法委員任期至中華民國九十一年六月三十日止」，計分別延長第三屆國民大會代表任期二年又四十二天及第四屆立法委員任期五個月。按國民主權原則，民意代表之權限，應直接源自國民之授權，是以代議民主之正當性，在於民意代表行使選民賦予之職權須遵守與選民約定，任期屆滿，除有不能改選之正當理由外應即改選，乃約定之首要者，否則將失其代表性。本院釋字第二六一號

and their limits granted to an elected public representative shall be directly derived from the delegation of the people. Therefore, the appropriateness of a democracy through representation lies in whether its public representatives execute their powers in accordance with those which were bestowed upon them and abide by their contracts with their electorate. One of the most critical aspects of this agreement is that, unless there is any proper reason for doing otherwise, an election must be held prior to the expiration of the term or there shall no longer be representation. By the same token, our Judicial Interpretation No. 261 states, "regular elections held at certain stipulated times both reflect the will of the general public and pave the way to the thorough execution of constitutional democracy." Here, the meaning of "proper reasons" must be within the confine of Judicial Interpretation No. 31, which points out the circumstances where "in the state of major national emergencies, no election for the next term of public representatives can in fact be conducted." The term extension for delegates of the National Assembly and members

解釋：「民意代表之定期改選，為反映民意，貫徹民主憲政之途徑」亦係基於此一意旨。所謂不能改選之正當理由，須與本院釋字第三十一號解釋所指：「國家發生重大變故，事實上不能依法辦理次屆選舉」之情形相當。本件關於國民大會代表及立法委員任期之調整，並無憲政上不能依法改選之正當理由，逕以修改上開增修條文方式延長其任期，與首開原則不符。而國民大會代表之自行延長任期部分，於利益迴避原則亦屬有違，俱與自由民主憲政秩序不合。

of the Legislative Yuan is not justified under the Constitution, nor is it in conformity with the fundamental principles laid out herein. Furthermore, the self-granted term extension for National Assembly delegates further violates the principle of disqualification in light of conflict of interests, and is not in conformity with the freedom and democratic state of constitutional rule of law.

5. The voting process in the passage of Articles 1, 4, 9, and 10 in its Eighteenth Meeting of the Third National Assembly on September 4, 1999, violates the principles of openness and transparency and the then-valid Article 38, Paragraph 2, of the Regulation of the National Assembly Proceedings. As the flaws of the procedure have achieved the level of major and clear erroneousness, it violates the fundamental principles which must be in full compliance before any such amendment is to take effect; furthermore, the contents of Article 1, Paragraphs 1 to 3, and Article 4, Paragraph 3, contradict the fundamental nature of governing norms and order that form the very basis and existence of the

五、第三屆國民大會於八十八年九月四日第四次會議第十八次大會以無記名投票方式表決通過憲法增修條文第一條、第四條、第九條暨第十條之修正，其程序違背公開透明原則及當時適用之國民大會議事規則第三十八條第二項規定，其瑕疵已達明顯重大之程度，違反修憲條文發生效力之基本規範；其中第一條第一項至第三項、第四條第三項內容並與憲法中具有本質重要性而為規範秩序賴以存立之基礎，產生規範衝突，為自由民主憲政秩序所不許。上開修正之第一條、第四條、第九條暨第十條應自本解釋公布之日起失其效力，八十六年七月二十一日修正公布之原增修條文繼續適用。

Constitution, and are prohibited by the norms of constitutional democracy. These provisions are held to be invalid as of the day this Interpretation is publicly announced. The Amendments to the Constitution enacted as of July 21, 1997, shall remain in effect.

REASONING: The petitioners are members of the Legislative Yuan who filed this petition for constitutional interpretation due to controversies arising from the execution of their powers and duties in light of the Amendments to the Constitution, promulgated on September 15, 1999. The grounds upon which the petition is based may be summarized as follows:

(1) The provisions of the Amendments to the Constitution, as passed by the National Assembly in the pre-dawn hours of September 4, 1999, were voted upon in the Second and Third Readings by anonymous ballots, which violated the procedure for constitutional amendments. Moreover, the voting process had major flaws and was clearly erroneous because the very same provisions had already been voted down during the Second Reading

解釋理由書：本件聲請人立法委員對八十八年九月十五日公布之中華民國憲法增修條文，因行使職權發生違憲疑義，聲請解釋。其聲請意旨經綜合歸納有下列五點：(一)國民大會八十八年九月四日凌晨所三讀通過之憲法增修條文，其二讀會及三讀會皆採無記名投票，與現行修憲程序不符，且在二讀會增修條文修正案已遭否決，竟違反議事規則重行表決，而告通過，有明顯重大之瑕疵。(二)憲法第二十五條規定國民大會代表全國國民行使政權，因此國大代表與選民間應有某種委任關係，增修條文第一條第一項改為所謂「政黨比例代表制」，不僅與上開條文之意旨歧異，抑且使未參加政黨或其他政治團體之人民，無從當選為國民大會代表，又發生與憲法第七條平等原則不符之疑義，而立法院已有委員擬具公職人員選舉罷免法相關條文修正案，其合憲性繫

but were brought up again in the Third Reading in a direct violation of the parliamentary rules.

(2) Article 25 of the Constitution states that the National Assembly shall exercise its powers on behalf of all citizenry; hence, it follows that there has to be some type of fiduciary relationship between the delegates of the National Assembly and their electorate. Article 1, Paragraph 1, of the Amendments to the Constitution, however, changed the [election] process to that of "representation by the apportionment of political parties." This not only contradicts Article 25, but also violates Article 7 of the Constitution on equal protection under the law, rendering those who are not affiliated with any political party ineligible for participation in the National Assembly. A related issue is the question of the constitutionality of pending legislation concerning the election and recall of public officials.

(3) Article 4, Paragraph 3, of the Amendments to the Constitution provides the term for members of the Fourth and Fifth Legislative Yuans, including the commencement and expiration day, yet

於前述疑義之解決。(三)增修條文第四條第三項均有第四屆及第五屆立法委員任期之起止日期，惟總統具有解散立法院之權限，此次增修並未改變；又增修條文第一條第三項前段既規定國民大會代表任期中遇立法委員改選時同時改選，後段復將第三屆國民大會代表任期固定為至第四屆立法委員任期屆滿之日止，均不相一致，究應適用何者，滋生疑義。況立法委員之任期乃聲請人等行使職權之基礎，須明確釋示以解除聲請人行使職權之不確定狀態。(四)審議預算為聲請人之憲法上職權，增修條文分別延長國民大會代表及立法委員之任期，則業經通過之八十九年度預算如何執行，亦與聲請人等行使職權有關。(五)延長國民大會代表及立法委員之任期，係違反與選民之約定，增修條文未規定自下屆起實施，但關於報酬或待遇之增加，增修條文第八條則明定應自次屆起實施，是否兩相矛盾，乃聲請人擬依憲法第一百七十四條第二款提案修憲之前提，應有明確之解釋。相關機關國民大會則對本院受理權限有所質疑，國民大會指派代表到院說明及所提書面意見，除主張依修憲程序增訂之條文，即屬憲法條文，而憲法條文之間不生相互牴觸問題，本院自無權受理外，又以司

only the President has the power to dissolve the Legislative Yuan. In addition, Article 1, Paragraph 3, first sentence, on the one hand stipulates that delegates of the National Assembly are subject to re-election and their term starts anew as long as the term of the Legislative Yuan has expired, even though it may occur in the middle of the term of the National Assembly members; the second sentence of the same provision also fixes the end of the Third National Assembly to the expiration of the Fourth Legislative Yuan. This creates inconsistency and questions on which rule should be applicable. A clarification will indeed eliminate the uncertainties concerning the petitioners' execution of their powers under the Constitution.

(4) The powers to review budgets lie within the constitutional powers and duties of the petitioners. Now that the Amendments to the Constitution has extended the terms of both the delegates of the National Assembly and the Legislative Yuan, how the already enacted appropriation legislation for fiscal year 2000 can be executed shall be determined upon the

法院大法官審理案件法第四條解釋之事項，以憲法條文有規定者為限為由，認本院不應受理解釋云云。

outcome of this Interpretation.

(5) It is a breach of the contract with the electorate to extend the term of National Assembly and Legislative Yuan members without clearly stipulating when the new term is to take effect. Yet the Amendments to the Constitution expressly provides that the compensation increase shall be applied as of the next session. Given the fact that this affects the very premises upon which the petitioners' power of making constitutional amendments is based under Article 174, Subparagraph 2, of the Constitution, a clarification on whether there is a contradiction is duly warranted.

The National Assembly, however, questioned [the Justices of this Yuan's] authority to accept the petition.[2] Its writ-

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[2] In accordance with Article 79, Paragraph 2 of the Constitution, the Judicial Yuan shall have a certain number of Grand Justices to interpret the Constitution and unify the interpretation of laws and orders. Article 3 of the Organic Law of the Judicial Yuan authorizes the appointment of no more than 17 Grand Justices with each serving a nine-year term. See Article 4, Paragraph 1, Amendment of the Constitution. A Grand Justice is to be nominated by the President and appointed by the National Assembly in extraordinary sessions. An extraordinary session requires more than half of the total delegates present to convene and more than half of the votes from those who are present to approve the appointment. See Articles 2, 3, and 15, National Assembly Approval Power Implementing Law of 1992. For any Constitution interpretation to pass, there must be a quorum of at least two thirds of the existing Grand Justices to convene the Grand Justices Council and two thirds of the votes by those who present at the Council. See Articles 2 and 14 of the Law of Constitutional Interpretation Procedure.

ten and oral arguments put forth by that body's representative claimed that any and all provisions enacted through the constitutional amendment process become an integral part of the Constitution and there can be no contradiction among constitutional provisions. Thus, this Yuan does not have the authority to review the case; furthermore, since the subject matters for interpretation under Article 4 of the Constitutional Interpretation Procedure Act are limited to those that are provided under the Constitution, this Yuan should not review the petition at hand.

Chapter Seven of the Constitution is specifically designated for the Judicial [branch]. Among other things, Article 78 states, "the Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretation of laws and orders." [3] The first part of Article 79, Para

查憲法第七章已就司法定有專章，其中第七十八條規定：「司法院解釋憲法，並有統一解釋法律及命令之權」，第七十九條第二項前段規定：「司法院設大法官若干人，掌理本憲法第七十八條規定事項」，是司法院大法官掌理解釋憲法及統一解釋法令之職

[3] English version of the Constitution is based on the official English translation of the Judicial Yuan. See Judicial Yuan, Major Statutes of the Republic of China, Volume I: Constitutional and Administrative Statutes, Taipei, Taiwan: Judicial Weekly Magazine, 1990, pp. 1-31. For English translation of the Amendment of the Constitution, see Hungdah Chiu, Constitutional Development and Reform in the Republic of China on Taiwan (with Documents), contained as Occasional Papers: Reprints Series in Contemporary Asian Studies, No. 2 - 1993 (115), Baltimore, Maryland: University of Maryland School of Law, 1993, pp. 52-61.

graph 2, states, “the Judicial Yuan shall have a certain number of Justices to take charge of matters specified in Article 78 of this Constitution....” It is, therefore, unequivocal that the Justices of the Judicial Yuan are charged with the power to interpret the Constitution and unify the interpretation of laws and statutes. In order to maintain and safeguard the Constitution as the supreme law of the nation, clarify the stratification and hierarchy of various laws and regulations, as well as firmly establish the authority and scope of the constitutional interpretation body, the Constitution further provides specific provisions outside of Chapter Seven. Hence, Article 117 states, “When doubt arises as to whether or not there is a conflict between provincial rules or regulations and national law, interpretation thereon shall be rendered by the Judicial Yuan.” Article171 provides, “Laws that are in conflict with the Constitution shall be null and void. When doubt arises as to whether or not a law is in conflict with the Constitution, interpretation thereon shall be rendered by the Judicial Yuan.” And Article 173 states, “The Constitution shall be in-

權，依上開條文固甚明確。惟憲法為維護其作為國家最高規範之效力、釐清各種法規間之位階關係並使釋憲機關之職掌更為確立，在第七章之外，尚就相關事項作個別規定，此為憲法第一百十七條：「省法規與國家法律有無牴觸發生疑義時，由司法院解釋之。」第一百七十一條：「法律與憲法牴觸者無效。法律與憲法有無牴觸發生疑義時，由司法院解釋之。」及第一百七十三條：「憲法之解釋由司法院為之。」等相關條文之所由設也。關於上述第一百七十三條規定之文字經遍查國民大會制憲實錄，自二十三年三月一日國民政府立法院發表之中華民國憲法草案初稿，以迄二十五年五月五日國民政府宣布之中華民國憲法草案（即俗稱五五憲草），均將「憲法之解釋由司法院為之」條文列於「附則」或「憲法之施行及修正」之章節。迨現行憲法制定時，既已有前述第七章第七十八條及第七十九條之規定，又於第十四章憲法之施行及修改，保留「憲法之解釋，由司法院為之」之文字作為第一百七十三條。對照以觀，第一百七十三條顯非為一般性之憲法解釋及統一解釋而設，乃係指與憲法施行及修改相關之事項，一旦發生疑義，其解釋亦屬本院大法官之職權。故有關憲法第

terpreted by the judicial Yuan." As concerns Article 173, having thoroughly reviewed the Constitutional Papers of the National Assembly, from the First Republic of China Constitution Draft issued by the Legislative Yuan of the National Government on March 1, 1934, to the Republic of China Constitution Draft announced by the National Government on May 5, 1936 (commonly known as the May Fifth Draft Constitution), the language "[t]he Constitution shall be interpreted by the judicial Yuan" has been consistently stipulated under the chapter heading "Supplemental Provisions" or "Implementation and Amendment of the Constitution." The present Constitution not only provides Articles 78 and 79 in Chapter Seven as indicated above, but also preserves the language "[t]he Constitution shall be interpreted by the judicial Yuan" as Article 173 in Chapter Fourteen, "Implementation and Amendment of the Constitution." By cross reference, it is clear that Article 173 is not designed only for general interpretation of the Constitution or unifying the meaning of laws, but it is also to entail the power of the Justices of

一百七十四條第一款國民大會代表總額應如何計算、國民大會非以修憲為目的而召集之臨時會得否行使修憲職權、前述有關憲法修改人數之規定應適用於國民大會何種讀會等有關修改憲法之程序事項，分別經本院作成釋字第八十五號、第三一四號及第三八一號解釋在案；依修改憲法程序制定性質上等同於憲法增修條文之動員戡亂時期臨時條款，其第六項第二款及第三款第一屆中央民意代表繼續行使職權之規定，與憲法民意代表有固定任期應定期改選之精神有無牴觸發生疑義等相關之實質內容，亦經本院釋字第二六一號解釋釋示有案。按法律規範之解釋，其首要功能即在解決規範競合與規範衝突，包括對於先後制定之規範因相互牴觸所形成缺漏而生之疑義（此為學理上之通說，參照 Karl Larenz, Methodenlehre der Rechtswissenschaft, 6.Aufl., 1991, S. 313ff.; Emillo Betti, Allgemeine Auslegungslehre als Methodik der Geisteswissenschaften, 1967, S. 645ff.），斯為釋憲機關職責之所在。本件聲請意旨所指之疑義，除指摘修憲程序有明顯重大瑕疵，乃修改憲法是否踐行憲法及相關議事規範所定之程序問題，因涉違憲審查之密度，另予闡釋外，其餘既屬於

the Judicial Yuan to cover any issues or doubts on the implementation and amendment of the Constitution. Thus, for procedural matters concerning amending the Constitution, the Judicial Yuan has respectively issued Interpretation No. 85 on how to tally the total number of delegates for the National Assembly, Interpretation No. 314 on whether Extraordinary Sessions of the National Assembly not convened for the purpose of amending the Constitution may nevertheless exercise the power to do so, and Interpretation No. 381 on which Reading in a given Session shall apply the quorum for constitutional amendments. The records also show that this Yuan issued Interpretation No. 261 to address the issue of whether there was any conflict between the fixed terms of delegates at the central level, hence the need for reelection, and the provision that permits the continuous exercising of power by the First central government delegates under Paragraph 6, Subparagraphs 2 and 3, of the Temporary Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion, which, by nature of its enacting

前述增修條文與憲法本文或增修條文相互之間衝突或矛盾所形成，又為聲請人行使職權之事項，即相關機關於八十九年元月十九日向本院提出之補充說明亦稱：「對任何時點之有效憲法條文，如果發生條文之間有矛盾或疑義之現象，釋憲機關得應聲請而進行釋憲工作」。本件聲請基本上係對經公布之憲法增修條文發生矛盾與疑義，而向本院提出，自不應對本院受理聲請解釋發生疑問。至相關機關所執司法院大法官審理案件法第四條之文字，質疑本院受理權限，實則聲請意旨所述之疑義，無一而非憲法本文或增修條文規定之事項，又此項規定旨在防止聲請釋憲事項逾越範圍涉及與憲法全然無關之事項，並非謂解釋憲法僅限對特定條文作文義闡釋，其質疑自不成立。

process, is equivalent to the Amendments to the Constitution.[4] The primary function of interpreting the law is to resolve overlap or conflict of rules, including doubts resulting from defects or gaps created by contradictory rules enacted at different times (This is the common theory; see Karl Larenz, Methodenlehre der Rechtswissenschaft, 6. Aufl., 1991, S. 313ff.; Emillo Betti, Allgemeine Auslegungslehre als Methodik der Geisteswissenschaften, 1967, S. 645ff.), and this should also be the duty for the institution charged with the power of constitutional interpretation. The issues pointed out in the present petition, except for the claim of clear and gross flaws in the Constitution amending process, which will be addressed separately, are created as a result of conflict or contradiction among

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[4] The National Assembly first adopted these set of provisions on April 18, 1948 (effective on May 10, 1948) in the midst of the civil war between the Nationalist (Kuomingtang, or KMT) and the Communist Party. They effectively "froze" certain Constitution provisions (such as term limits on the President and delegates of the Central Government) and expend the emergency power of the President. They went through four amendments (or expansions of exceptions to the Constitution) ever since before eventually repelled by the National Assembly on April 22, 1991 (effective May 1, 1991) in light of improved atmosphere and change of domestic attitude/policy towards Mainland China as well as Taiwan's transition to a full democracy. A set of Amendment of the Constitution comprise of ten provisions came into effect at the same time. For detailed illustrations, see Hungdah Chiu, id., pp. 14-38.

several provisions between the Amendments to the Constitution and the Constitution itself or within the Amendments to the Constitution. These fall within the scope of powers and duties of the petitioners. In its supplemental briefs on January 19, 2000, even the related agency [the National Assembly] also stated, "As far as any effective constitutional provision at a specific space-time is concerned, if there should be any sign of contradiction or conflict among different constitutional provisions, the constitutional interpretation authority may proceed with its constitutional interpretation duty in response to a petition." Since the present petition was basically filed to this Yuan in light of questions and doubts raised out of provisions of the publicly announced Amendments to the Constitution, there should be no dispute over this Yuan's acceptance of the petition. With regard to the related institution's questioning of this Yuan's scope of power by relying on the language of Article 4 of the Constitutional Interpretation Procedure Act, it is groundless given that none of the issues raised are not items stipulated by the Constitu-

tion itself or the Amendments to the Constitution, provided that the purpose of Article 4 is to prevent excessive claims within a petition that has nothing to do with the Constitution, not that constitutional interpretation is only limited to certain specific provisions.

Based upon the Constitution, precedents of this Yuan's interpretation, and legal doctrines, the petition at bar meets the requirements provided under Article 5, Paragraph 1, Subparagraph 3, of the Constitutional Interpretation Procedure Act and this Yuan must accept the petition.

本件聲請無論就憲法、本院解釋先例及法理論斷，均與司法院大法官審理案件法第五條第一項第三款所定要件相符，應予受理，合先說明如上。

The Constitution is the fundamental basis and supreme law of the country. Its amendment greatly affects the stability of constitutional order and the well-being of all citizenry and, therefore, must be done by the authorized [governmental] body in accordance with constitutional due process. In accordance with Article 25, Article 27, Paragraph 1, Subparagraph 3, of the Constitution and Article 1, Paragraph 3, Subparagraph 4, of the Amendments to the Constitution, as promulgated on July

憲法為國家根本大法，其修改關係憲政秩序之安定及全國國民福祉至鉅，應由修憲機關循正當修憲程序為之。國民大會依憲法第二十五條、第二十七條第一項第三款及八十六年七月二十一日修正公布之憲法增修條文第一條第三項第四款規定，係代表全國國民行使修改憲法權限之唯一機關，並無其他任何制約，與其他國家修改憲法須分別經由國會中不同議院之決議，或先經國會通過修改案再提交公民複決或另由各邦（州）依法定程序予以批准，皆不相

21, 1997, the National Assembly is the sole governmental body or institution empowered to amend the Constitution without any other check or balance. This is different from other countries where constitutional amendments must be approved by separate houses within the Parliament, or referendum by the general public or ratification by individual states (provinces) in accordance with due process after parliamentary enactment. Therefore, the constitutional amendment proceedings must especially abide by the due process to ensure that the will of the public is indeed fully taken into consideration. The exercise of the power to enact the Amendments to the Constitution must be based upon the principles of openness and transparency and be in compliance with Article 174 of the Constitution as well as related rules of the National Assembly so as to live up to the reasonable expectation and trust of all the people. Based upon the principle of sovereignty of and by the citizenry (Article 2 of the Constitution), national sovereignty must be ensured by a process of communication through which people express and formulate their opin-

同，是國民大會修改憲法尤須踐行正當修憲程序，充分反映民意。國民大會依修改憲法程序制定憲法增修條文，須符合公開透明原則，並應遵守憲法第一百七十四條及國民大會議事規則之規定，俾副全國國民之合理期待與信賴。蓋基於國民主權原則（憲法第二條），國民主權必須經由國民意見表達及意思形成之溝通程序予以確保。易言之，國民主權之行使，表現於憲政制度及其運作之際，應公開透明以滿足理性溝通之條件，方能賦予憲政國家之正當性基礎。而修憲乃最直接體現國民主權之行為，依國民大會先後歷經九次修憲，包括動員戡亂時期臨時條款及增修條文之制定與修改，未有使用無記名投票修憲之先例，此亦屬上開原則之表現；國民大會代表及其所屬政黨並藉此公開透明之程序，對國民負責，國民復可經由罷免或改選程序追究其政治責任。是現行國民大會議事規則第三十八條第二項關於無記名投票之規定，於通過憲法修改案之讀會並無適用餘地。蓋通過憲法修改案之讀會，其踐行不僅應嚴格遵守憲法之規定，其適用之程序規範尤應符合自由民主憲政秩序之意旨（參照本院釋字第三八一號闡釋有案）。

ions. In other words, while the exercise of national sovereignty is reflected through the constitutional system and its operation, it must be open and transparent to satisfy the requirement of rational communications so that the foundation of a constitutional state can be properly laid. Amending the Constitution is the most direct act in realizing the national sovereignty. That in the nine times the National Assembly undertook to amend the Constitution, including enacting and amending the Temporary Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion and the Amendments to the Constitution, anonymous balloting was never used further demonstrates the application of the principle [of sovereignty of and by the people]. Through an open and transparent process, the National Assembly delegates and their affiliated political parties are held accountable to the citizens; the citizens may then in turn seek ultimate political responsibility from them through recall or reelection. Therefore, Article 38, Paragraph 2, of the Regulation of the National Assembly Proceedings concerning

anonymous balloting does not apply to the Readings on the amendment of the Constitution. To carry out the Readings for amending the Constitution, the Constitution itself must be strictly adhered to, and the applicable procedural rules must especially comply with the spirit upon which the order of freedom and constitutional democracy is founded (See J.Y. Interpretation No. 381).

Based on the minutes and stenographic records of the National Assembly, with regard to the provisions that went through the Third Reading on September 4, 1999, as a part of the Amendments to the Constitution, there were indeed many procedural flaws, including the following: (1) the Second and Third Readings were indeed tallied on anonymous ballots, (2) the handling of a motion to commit (reconsider) did not comply with the Regulation of the National Assembly Proceedings,[5] (3) the valid motion to adjourn did not take precedence and was disposed of, (4) the process of recasting votes over

國民大會於八十八年九月四日三讀通過修正之憲法增修條文，依其議事錄及速記錄之記載，修憲之議事程序實有諸多瑕疵，諸如：(一)二讀及三讀會採無記名投票，(二)復議案之處理未遵守議事規則，(三)散會動議既經成立未依規定優先處理，(四)已否決之修憲案重行表決與一般議事規範不符，(五)二讀會後之文字整理逾越範圍等。第按瑕疵行為依其輕重之程度，產生不同法律效果。修改憲法乃國民主權之表達，亦係憲法上行為之一種，如有重大明顯瑕疵，即不生其應有之效力（參照本院釋字第四一九號解釋理由書，載司法院大法官解釋續編，第十冊，第三三二

5 Articles 42-44, Rules of the National Assembly Proceedings.

already dismissed proposals to amend the Constitution contradicted the general parliamentary rule of order, and (5) the adjustment of language exceeded the scope permitted after the Second Reading. Different degrees of flaws beget different legal consequences. Amending the Constitution is the expression of the peoples' sovereignty and one of the constitutional acts. It shall not take its intended legal effect if and when it is clearly and grossly flawed (See Interpretation No. 419, contained in COMPILATION OF JUSTICES INTERPRETATIONS, SECOND SERIES, Volume 10, p. 332). "Clearly" means [material] facts are so obvious that they can be determined without investigation; "grossly" means, as far as parliamentary procedure is concerned, the flaw is so significant that due process is no longer present and the basic rule of constitutional amendment is violated (See Interpretation No. 342, id., Volume 8, p. 19). Among all types of flaws, anonymous balloting has reached the level of being clear and gross. Without contradicting the Constitution and the laws, the National Assembly may implement parliamentary rules ex officio

頁）。所謂明顯，係指事實不待調查即可認定；所謂重大，就議事程序而言則指瑕疵之存在已喪失其程序之正當性，而違反修憲條文成立或效力之基本規定（參照本院釋字第三四二號解釋理由書，前引續編，第八冊，第一九頁）。前述各種瑕疵之中，無記名投票已達重大明顯之程度。國民大會行使職權之程序，得就開議之出席人數、可決人數、提案暨表決等事項，於不牴觸憲法與法律範圍內，自行訂立議事規範行之。國民大會議事規則第三十八條第二項規定：「前項之表決方法，得由主席酌定以舉手、起立、表決器或投票行之。主席裁定無記名投票時，如有出席代表三分之一以上之提議，則應採用記名投票」。此項規定在一般議案之表決固有其適用，若屬於通過憲法修改案之讀會時仍採用無記名投票，則與前述公開透明原則有違。查本件國民大會於八十八年九月四日議決通過之憲法增修條文，其二讀及三讀程序，依第三屆國民大會第四次會議第十八次大會議事錄記載，係採無記名投票方式，微論已與前述公開透明原則有所牴觸，即衡諸會議時所適用之國民大會議事規則第三十八條第二項，亦顯屬有違。蓋依上開議事錄記載，修憲案於進行二讀會及三讀會以

to carry out its powers and duties on such matters as quorum, bills submission, and vote casting. Article 38, Paragraph 2, of the Regulation of the National Assembly Proceedings states, “The chairman shall have the prerogative in deciding the voting mechanism stated in the last paragraph, be it hand raising, standing, voting device, or balloting. If and when the chairman should rule on anonymous balloting, the vote shall nevertheless be cast by open ballots if more than one-third of the delegates present propose to do so.[6] “ While this rule is applicable to the vote casting of general meeting items, for passage of constitutional amendments, anonymous balloting in the Readings is a violation of the principle of openness and transparency as indicated above. Examining the records of the Eighteenth Conference, Fourth Session of the Third National Assembly, the Second and Third Readings conducted in the passage of the provisions to be included in the Amendments to the Constitution on September 4, 1999,

前，已有代表提議：於修憲各議案進行二讀會及三讀會時以無記名投票方式為之，經表決結果，在場人數二百四十二人，贊成者為一百五十人。惟另有代表提案依國民大會議事規則第三十八條第二項規定建請大會在處理所有修憲提案表決時，採用記名投票方式行之。經表決結果，在場人數二百四十二人，贊成者有八十七人，投票贊成者已超過出席代表三分之一。依前述議事規則第三十八條第二項規定意旨，表決方式即應採用記名投票，方屬正辦，此不因大會主席就表決方式有無裁決而有異，蓋上述規定之意旨，乃在尊重少數代表之意見，以實現程序正義。詎大會竟以多數決採用無記名投票，表決修憲提案，顯已違反議事規則第三十八條第二項所定三分之一以上代表人數得為提議之保障規定，亦與行憲以來修憲程序之先例不符，致選民對國民大會代表行使職權之意見無從知悉。憲法第一百三十三條「被選舉人得由原選舉區依法罷免之」之規定以及本院釋字第四〇一號解釋：「國民大會代表經國內選舉區選出者，其原選舉區選舉人，認為國民大會代表

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[6] On April 14, 2000, the 5th Session of the Third National Assembly in its 3rd Conference revised Article 38 in the aftermath of this Interpretation. The one third overriding rule is now completely repelled.

were done by anonymous balloting, a clear violation of not only the principle of openness and transparency but also Article 38, Paragraph 2, of the Regulation of the National Assembly Proceedings then in effect. Based on the conference minutes stated above, there were delegates who proposed anonymous balloting in the Second and Third Readings before they were to take place. The result showed that of the 242 delegates present, 150 voted for the proposal. However, some other delegates proposed that open balloting should be adopted in dealing with all constitutional amendments. Out of the 242 delegates present, 87 voted for the adoption, and this number exceeded the one-third of the delegates present. Based on the meaning and spirit of Article 38, Paragraph 2, which is to respect the opinion of the minority in order to fulfill procedural due process, the vote should have been conducted by open balloting as well and the chairman's ruling otherwise should not have swayed this outcome. Yet the Conference nevertheless by a [simple] majority adopted anonymous balloting to vote on bills concerning constitutional

所為之言論及表決不當者，得依法罷免」之釋示，暨依本院釋字第三三一號解釋意旨，各政黨對該黨僑居國外國民及全國不分區之代表追究其黨紀責任，使其喪失黨員資格，連帶喪失代表身分，均無從貫徹。聲請意旨指修憲行為具有明顯重大瑕疵非無理由，此部分之修憲程序違反修憲條文發生效力之基本規範。

amendments. This violates not only the one-third rule designed for the protection of the minority under Article 38, Paragraph 2, of the Regulation of the National Assembly Proceedings, but also precedents on amending the Constitution since its inception, rendering the electorate no way of learning how the National Assembly carried out its powers and duties.[7] Furthermore, [due to the irregularities,] many other provisions could not be carried out. [For example,] Article 133 of the Constitution, "An individual elected may, in accordance with law, be recalled by his constituency"; Interpretation No. 401, "A National Assembly delegate elected from domestic districts, may, in accordance with law, be recalled by the electorate of that district, on the ground that the dele-

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[7] The Constitution took effect on January 1, 1947, thereby marking the beginning of the Period of Constitution Governance in the history of the Republic of China while putting an end to the Period of Tutelage Governance (1931-1946), in theory a hybrid of military and civilian rule that served as a transition between the Period of Military Governance (1912-1930) since the revolution that established the Republic and the final Period of Constitution Governance, with the KMT sitting at its helm. This theory of two transitional periods of governance before the eventual constitutional rule-of-law was first proposed by Dr. Sun Yat-sen, regarded as the founding father of the 1912 revolution that established the Republic of China, and adopted by KMT's First National Conference on January 23, 1924. See Sun Yat-sen, Outlines of National Reconstruction for the National Government, Paragraphs 5-8, 22-25, contained in SELECTED WORKS OF SUN YET-SAN, Beijing, China: People's Publishing Co., 1981, pp. 601-604 (text in Chinese).

gate has cast inappropriate speech or vote" and Interpretation No. 331 on individual political parties' authority to discipline their nationwide and overseas members by depriving them of party membership so as to disqualify their delegate status.[8] It is not without reason in the petitioners' claims that clear and gross flaws were committed and the particular process of amending the Constitution violated the basic principles upon which the constitutional amendments would take effect.

The National Assembly claims, on the other hand, that in accordance with Interpretations Nos. 342 and 381, the constitutionality of the Constitution amending process is a matter of self-governance within the power of the Parliament, and should be beyond the scope of the institution charged with [the power of] constitu-

本件相關機關國民大會雖主張：修憲程序之合憲性，依本院釋字第三四二號、第三八一號解釋，均屬議會自律事項，釋憲機關不應加以審究；並以外國之案例主張修憲程序不受司法審查；又國會議員基於自由委任地位，採公開或不公開之表決，均為憲法精神之所許云云。惟查憲法條文之修改應由憲法所

[8] In accordance with Article 1 of the 1991 Amendment of the Constitution, the National Assembly shall consist of 225 elected delegates, plus 80"nationwide"and 20 overseas delegates to be allocated based on the percentage of popular votes received by political parties that cross the 5% threshold of all popular votes. Of the 100 delegates who are not subject to election, their status hinges solely on the affiliation with a certain political party and the loss of party membership constitutes automatic dismissal (disqualification) of being a delegate (including the Speakership) of the National Assembly.

tional interpretation.[9] It also cited foreign judicial authorities to buttress the argument that the process of amending the Constitution should not be subject to judicial review, and that delegates, within their mandate to exercise discretionary delegation and in the spirit of the Constitution, are permitted to conduct their votes by anonymous or open ballots. However, as indicated henceforth, the premise for a constitutional provision to take effect is that an amendment to the provisions of the Constitution should be passed by a constitutionally designated institution through due process in amending the Constitution. If and when there is a dispute, the institution for the interpretation of the Constitution naturally has the power to accept a petition for interpretation. As far as the parliamentary proceeding of the Related Institution (the National Assembly) is concerned, it is a matter of the intensity of inquiry by the constitutional interpretation institution to exercise its review power to determine what an

定之機關依正當修憲程序議決通過，為憲法條文有效成立之前提，一旦發生疑義，釋憲機關自有受理解釋之權限，已見前述；至於相關機關所踐行之議事程序，於如何之範圍內為內部自律事項，何種情形已逾越限度而應受合憲性監督，則屬釋憲機關行使審查權之密度問題，並非謂任何議事程序皆得藉口內部自律事項，而規避其明顯重大瑕疵之法律效果；又國民大會通過憲法修改案之讀會，其出席及贊成人數必須符合憲法第一百七十四條第一款之規定，至於僅作大體討論即交付審查之一讀會其開議出席人數究採上開條款所定人數抑國民大會組織法第八條代表總額三分之一或參照一般會議規範所定出席人數為之，由國民大會依議事自律原則自行處理，但其處理仍應符合自由民主憲政秩序之原則，並非毫無限制，本院釋字第三四二號及第三八一號解釋分別闡釋有案。再所謂自律事項並不包括國民大會代表參與會議時之一切行為，故未經依法宣誓或其宣誓故意違反法定方式者，即不得行使職權（諸如投票、表決等），其未依法宣誓之國民大會代表，可出席會

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[9] Interpretation No. 76 held that the National Assembly, the Legislative Yuan and the Control Yuan are jointly and severally equivalent to the Parliament" in a democratic state.

internal self-regulatory issue is and what exceeds the scope and should therefore be subject to the scrutiny of its constitutionality. Thus, not all parliamentary proceedings that are clearly and grossly flawed may take the pretext of being internal, self-regulatory matters and evade their legal consequences. In Interpretations Nos. 342 and 381, [we ruled that] the quorum to convene the Readings and to cast votes on amending the Constitution must comply with Article 174, Subparagraph 1, of the Constitution. As to the First Reading, which only encompasses general discussions and commitment for [the committee's] review, whether the quorum to convene should comply with the same provision or one-third of the total delegates in accordance with Article 8 of the Organic Act of the National Assembly, or [can simply] make reference to the rules of order in a general meeting shall be dependent upon the National Assembly's self-regulated meeting rules. Yet while such disposition is not without any limits, it should nevertheless comply with the principles of constitutional order of freedom and democracy. In Interpretation

議方屬應由國民大會自行處理之自律事項，亦經本院釋字第二五四號解釋釋示在案，是相關機關以自律事項為由，主張本院無權審究，並不足採。關於相關機關以比較憲法上理論或案例主張修憲程序不受司法審查乙節，按修改憲法及制定法律之權限由同一機關（即國會）行使之國家（如德國、奧地利、義大利、土耳其等），修憲與立法之程序僅出席及可決人數有別，性質上並無不同，修憲程序一旦發生疑義時，憲法法院得予審查，為應邀到院多數鑑定人所肯認，相關機關對此亦無異詞。在若干國家司法實例中，憲法法院對修憲條文有無牴觸憲法本文不僅程序上受理，抑且作實體審查者，非無其例（例如德國聯邦憲法法院一九七〇年十二月十五日判決 BVerfGE30, 1ff.，譯文見本院大法官書記處編，德國聯邦憲法法院裁判選輯(八)，二二六 － 二八三頁；義大利憲法法院一九八八年十二月二十九日判決 sent. n.1146/1988, 並參照 T. Martines, Diritto Constituzionale, Nono ed. 1998, p.375；土耳其憲法法院一九七一年六月七日一三八五五號判決及一九七二年七月二日一四二三三號判決，引自 Ernst E. Hirsch, Verfassungswidrige Verfassungsänderung－Zu zwei

No. 254, [it is ruled that] the so-called "self-regulatory" matters do not cover all aspects of National Assembly delegates' participation in a given conference. Those who have not been sworn in or whose swearing in intentionally violates the legally prescribed process shall not carry out their powers and duties (such as casting votes). For those who have not been duly sworn in as delegates, whether they can nevertheless participate in the sessions or conferences is a self-regulatory matter which may be disposed of by the National Assembly itself. Therefore, the Related Institution's claim that this Yuan has no jurisdiction over self-regulatory matters is without merit. With regard to its claim, based on the theory of a comparative constitution or certain precedents, that the process of amending the Constitution is not subject to judicial review, the Related Institution has no quarrel; however, it does dispute the fact that, for countries which place the power of amending the Constitution and enactment of laws in one single institution (the Parliament, such as in Germany, Austria, Italy and Turkey), with the only difference between the two

Entscheidungen des Türkischen Verfassungsgerichts, Archiv des öffentlichen Rechts, 98, 1973）。若修改憲法與制定法律之機關及程序皆屬有異者（如美國），則觀點較為分歧。相關機關一面援引美國聯邦最高法院一九三九年 Coleman v. Miller, 307 U.S. 433（1939）一案，主張國會得專屬並完全決定修憲程序，不受司法審查，一面又引該國學者之著作，謂修憲程序為政治性程序，聯邦憲法第五條有關修憲程序之規定乃獨立於一般法律程序之外，司法機關不應干預云云（見相關機關所引述之 Laurence H. Tribe, American Constitutional Law, vol. 1, 3rd ed., p.105（2000））。實則上開 Coleman 案中最高法院對修憲程序是否均為政治性問題而不予司法審查，或仍可能屬於一般憲法問題得由法院予以解釋，在美國並未形成多數意見。一九八四年美國聯邦最高法院在關於加州公民提議修改聯邦憲法之有關事件中，大法官 Rehnquist 表達該院之見解，認為不能以 Coleman 一案，即論斷一切修憲程序均屬政治問題，而排除於法院審查之外（Uhler v. AFL-CIO,468 U.S. 1310（1984）），顯見美國法院對修憲程序仍得斟酌憲法之意旨而為適當之審查。即使相關機關所

being the quorum to convene and to vote, the constitutional court may review any doubts generated from the process of constitutional amendment. The majority of experts present at the oral argument also acknowledged [this point]. Among judicial precedents in several countries, cases have shown that their constitutional courts not only take on procedural matters, but also conduct review on substantive matters; for example, the German Bundesverfassungsgericht (Federal Court of Constitution, or BVG) decision on December 15, 1970 (BVerfGE 30, 1ff., for [Chinese] translation, see Department of the Administration of the Constitutional Court, ed., SELECTED COMPILATION OF JUDGMENTS OF THE BUNDESVERFASSUNGSGERICHT, vol. 8, pp. 226-283); the Italian Corte Constituzionale (Court of Constitution) decision on December 29, 1988, sent. N. 1146/1988, see also T. Martines, DIRITTO CONSTITUZIONALE, Nono ed., 1998, p. 375; and the Turkish Court of Constitution Judgment No. 13855 on June 7, 1971, and No. 14233 on July 2, 1972, cited from Ernst E. Hirsch, Verfassungswidrige Ver-

引述之該美國學者於同一著作中亦認為：「若國會對一項僅獲三十五州批准之修憲案，認已符合憲法第五條所定須四分之三州同意之要求，即不可能期待法院亦尊重國會之判斷。」（Tribe, American Constitutional Law, op. cit., p. 105）及「學者對修憲程序是否可供司法審查見解之歧異，多在於法院介入審查範圍廣狹之不同」（Ibid., p. 372）。姑不論我國憲法對憲法之施行及修改，賦予釋憲機關解釋之權限，已如上述，外國之法制自難比擬，縱以相關機關所引之美國憲法實例，亦不足以質疑釋憲機關對修憲程序審查之範圍。

fassungsänderung - Zu zwei Entscheidungen des Türkischen Verfassungsgerichts, ARCHIV DES ÖFFENTLICHEN RECHTS, p. 98, 1973). [However, for countries that place] differences on both the institution and the process of the constitutional amendment and legislative enactment (such as the United States), diverse viewpoints do exist. Citing the U.S. Supreme Court's opinion on Coleman v. Miller, 307 U.S. 433 (1939), the Related Institution claimed that Congress has complete and exclusive power in deciding the process of amending the constitution without subjecting itself to judicial review. In addition, by reference to the work of an American scholar, it argued that amending the constitution is a political process and Article 5 of the federal Constitution regarding constitutional amendments is independent from the general legal process and should be subject to no interference by the Judicial Branch (See Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW, 3rd ed., vol. 1, p. 105 (2000), cited by the Related Institution). However, the Coleman holding that the court lacks jurisdiction because

ratification of a constitutional amendment is a "political question" has not achieved the status of majority opinion in the United States. In a 1984 case involving a California citizens' initiative to amend the constitution, Justice William Rehnquist, writing on behalf of that court, held that Coleman cannot be read expansively to conclude that the process of amending the constitution is a matter of "political question," thereby exempt from judicial review (Uhler v. the American Federation of Labor-Congress of Industrial Organizations, 468 U.S. 1310 (1984)).[10] It is obvious that the U.S. courts may nevertheless conduct proper review [over the constitutionality] of a constitutional amending process, based on the purpose and spirit of

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[10] Justice Rehnquist was then an Associate Justice who in 1986 became the Chief Justice. To distinguish Uhler from Coleman, he wrote, "In that case [Coleman], four Justices of this Court adopted the position that the Court lacked jurisdiction to rule on questions arising in connection with the ratification of a constitutional amendment because all such questions were "political" in nature. But that position did not command a majority in Coleman, supra, and however this Court would presently resolve the issues raised in the Coleman case, I do not think a majority would subscribe to applicants' expansive reading of the "political question" doctrine in connection with the amending process. Acceptance of applicants' arguments would, in effect, mean that courts in the State of California or elsewhere would be powerless to prevent the placing on the ballot of initiative measures designed to play a part in the process of amending the United States Constitution even though such initiative proposals clearly did not comply with state requirements as to the necessary number of signatures, time of filing, and the like."

the constitution. The same scholar quoted by the Related Institution even stated in the same publication, "[n]or should we expect the courts to defer to a congressional judgment... that ratification by thirty-five out of fifty states satisfies Article V's three-fourths requirement" (Tribe, id., p. 105) and "commentators on the subject tend to disagree mainly on the scope of... judicial review..." (Id., p. 372).[11] While it is apparently difficult to compare a foreign legal system with this Institution's power over the interpretation of the constitutional implementation and amendment, even with the U.S. Constitution precedents as cited by the Related Institution [as basis], it is still not sufficient to question the scope within which the Interpretation Institution may review the amending process of the Constitution.

As to the Related Institution's argument that the adopting of anonymous bal-

至於相關機關以自由委任理論為其採無記名投票理由一節，按現代民主

[11] Emphasis quoted from original text. The full text is, "commentators on the subject tend to disagree mainly on the scope of the undoubtedly limited judicial review that is appropriate in governing the process by which amendments proposed by Congress are ratified by the states." " The constitutional appropriateness of the substance of proposed amendments, however, is almost certainly committed to judicially unreviewable resolution by the political branches of government."

loting was based on the theory of discretionary delegation, the majority of modern democratic states have adopted discretionary delegation as opposed to compulsory delegation, meaning an elected official represents all people instead of serving only as a kind of dispatcher for the electorate of a particular given district, whose speech and votes are exempted from liability, so that even the electorate from the original district may not recall that delegate. However, this does not mean a delegate may be completely exempted from the discipline of his or her political party or public opinions while exercising his or her powers and duties. Unlike the constitutions in most American and European states, ours expressly stipulates that elected officials at all levels may be recalled by their constituency (Article 133 of the Constitution and Interpretation No. 401). In that regard, [our system] is not really a pure form of discretionary delegation. It follows that discretionary delegation may not be the justification for the adoption of anonymous balloting, a violation of the expressed parliamentary rules.

國家固多採自由委任而非強制委任，即民意代表係代表全國人民，而非選區選民所派遣，其言論表決對外不負責任，原選區之選民亦不得予以罷免，但非謂民意代表行使職權因此全然不受公意或所屬政黨之約束，況且我國憲法明定各級民意代表均得由原選舉區罷免之（憲法第一百三十三條及本院釋字第四〇一號解釋），與多數歐美國家皆有不同，就此而言，亦非純粹自由委任，從而尚不能以自由委任作為其違背議事規則之明文規定採無記名投票之正當理由。

The National Assembly exercises its powers and carries out its duties in accordance with Article 174 of the Constitution in amending the Constitution with due process. The resulting enactment of the Amendments to the Constitution has equal status with the original constitutional provisions, yet the permission of any amendment designed to alter existing constitutional provisions concerning the fundamental nature of governing norms and order and, hence, the foundation of the Constitution's very existence destroys the integrity and fabric of the Constitution itself. As a result, such an amendment shall be deemed improper. Although our Constitution does not expressly identify those unchangeable provisions, among the several constitutional provisions, principles such as establishing a democratic republic under Article 1, sovereignty of and by the people under Article 2, protection of fundamental rights of the people under Chapter Two as well as the check and balance of governmental powers are some of the most critical and fundamental principles of the Constitution. Constitutional freedom and democratic rule of law

國民大會依正當修憲程序行使憲法第一百七十四條修改憲法職權，所制定之憲法增修條文與未經修改之憲法條文係處於同等位階，惟憲法條文中具有本質之重要性而為規範秩序存立之基礎者，如聽任修改條文予以變更，則憲法上整體規範秩序將形同破毀，此等修改之條文則失其應有之正當性。我國憲法雖未明定不可變更之條款，然憲法條文中，諸如：第一條所樹立之民主共和國原則、第二條國民主權原則、第二章保障人民權利、以及有關權力分立與制衡之原則，具有本質之重要性，亦為憲法基本原則之所在。基於前述規定所形成之自由民主憲政秩序（參照現行憲法增修條文第五條第五項及本院釋字第三八一號解釋），乃現行憲法賴以存立之基礎，凡憲法設置之機關均有遵守之義務。國民大會為憲法所設置之機關，其具有之職權既為憲法所賦予，亦應受憲法之規範。國民大會代表就職時宣誓效忠憲法，此項效忠係指對憲法忠誠，憲法忠誠在依憲法第一百七十四條規定行使修憲權限之際，亦應兼顧。憲法之修改如純為國家組織結構之調整，固屬「有權修憲之機關衡情度勢，斟酌損益」之範疇（見前引本院解釋續編，第十冊，三三三頁），而應予尊重，但涉

derived from these principles (See Article 5, Paragraph 5, Amendments to the Constitution and Interpretation No. 381), are the foundations upon which the current Constitution is constructed, and all institutions installed thereunder are obligated to abide by its rules. Since the National Assembly is a constitutionally installed institution and its power is bestowed by the Constitution, it must also be regulated by the Constitution. At the time of inauguration, delegates of the National Assembly must be sworn in and pledge allegiance to the Constitution. This means loyalty and adherence to the Constitution which must be taken into consideration while exercising the power granted by Article 174 of the Constitution in amending that Constitution. In the event an amendment to the Constitution touches purely on the adjustment of national organizational structure, it falls under "the discretionary scope of the institution empowered to amend the Constitution, taking into consideration the totality of the circumstances" (See the Reasoning for Interpretation No. 419, COMPILATION OF JUSTICES INTERPRETATIONS, SECOND SERIES, Vol-

及基於前述基本原則所形成之自由民主憲政秩序之違反者，已悖離國民之付託，影響憲法本身存立之基礎，應受憲法所設置其他權力部門之制約，凡此亦屬憲法自我防衛之機制。從而牴觸憲法基本原則而形成規範衝突之條文，自亦不具實質正當性。

ume 10, p . 333) and must be respected.[12] However, any violation that touches upon the basic principles of constitutional freedom and democratic rule of law breaches the fiducial duty to the people, affects the foundation of the very existence of the Constitution, and must be checked and balanced by other constitutionally installed institutions. This is also the built-in, self-defensive mechanism in the Constitution. Therefore, any provision that contradicts the basic principles of the Constitution and results in a conflict of rules does not possess proper merits.

The constitutional amendment in question, voted upon by the National Assembly on September 4, 1999, stipulated in Article 1, Paragraph 1, "There shall be three hundred delegates for the Fourth National Assembly elected by the method of proportional representation and in accordance with the following regulations, together with proportional allocation of quota based upon the election [result] of the Legislative Yuan and the votes re-

本件國民大會於八十八年九月四日通過之憲法增修條文第一條第一項前段：「國民大會代表第四屆為三百人，依左列規定以比例代表方式選出之。並以立法委員選舉，各政黨所推薦及獨立參選之候選人得票數之比例分配當選名額，不受憲法第二十六條及第一百三十五條之限制。」第二項前段：「國民大會代表自第五屆起為一百五十人，依左列規定以比例代表方式選出之。並以立法委員選舉，各政黨所推薦及獨立參選

[12] Thus, it falls outside of the Grand Justices Council's jurisdiction.

ceived by independent candidates or candidates recommended by respective political parties, without being subject to the restrictions under Articles 26 and 135 of the Constitution...” and in Paragraph 2, “There shall be one hundred fifty delegates as of the Fifth National Assembly elected by the method of proportional representation and in accordance with the following regulations, together with proportional allocation of quota based upon the election [result] of the Legislative Yuan and the votes received by independent candidates or candidates recommended by respective political parties, without being subject to the restrictions under Articles 26 and 135 of the Constitution....” Calling it proportional representation, both [provisions] allocate the seats of delegates by relying upon the election result of the Legislative Yuan and the votes received by independent candidates or candidates recommended by respective political parties. Unlike representation by majority or minority, proportional representation bases the allocation of delegate seats upon the share of votes received by a certain political party or candidate, and is,

之候選人得票數之比例分配當選名額，不受憲法第二十六條及第一百三十五條之限制」，均以立法委員選舉，各政黨所推薦及獨立參選之候選人得票數之比例分配計算國民大會代表之當選名額，而稱之為比例代表方式。第按所謂比例代表，乃依政黨或候選人得票數之比例計算當選及議員議席分配之方法，而有別於多數代表制、少數代表制等方式，比例代表制之採行仍須以舉辦該特定公職人員之選舉為前提，若本身未曾辦理選舉，而以他種性質不同、職掌相異公職人員選舉之得票作為當選與否及分配席次之依據，則等同於未經選舉程序而產生，先進民主國家亦未有此種所謂選舉之事例（參照中央選舉委員會八十八年十二月二十八日八十八中選一字第八八九一三五六號致本院秘書長函），是依照此種方式產生之國民大會代表，已不具民意代表身分，充其量為各政黨指派之代表，誠如聲請解釋意旨所稱，國民大會行使政權，須以國民直接選舉之代表組成為前提，如適用新修改之增修條文則無異由政黨指派未經選舉之人員代表國民行使政權，明顯構成規範衝突。若此等代表僅賦予諮詢性功能尚無不可，但仍得行使憲法第四條領土變更之議決權，增修條文第一條補選副總

therefore, premised on the holding of that particular election. If apportionment is based upon results from other elections of public officials different in nature and duties [from the present one] without having an election of its own kind, it is the equivalent of having delegates installed without going through the election process. This is unprecedented even among the most advanced democracies (See the Central Election Committee letter of December 28, 1999, to the Secretary General of the Judicial Yuan, (88) Chun Shuan I Tze No. 8891356). Thus, delegates produced through this process constitute, at most, representatives delegated by various political parties and do not possess the status of elected public officials. As the petition correctly pointed out, delegates must be directly elected by the people to exercise the powers and duties of the National Assembly. The application of these provisions amounts to an apparent conflict of rules in that the power of governing is handled by a number of political party-delegated individuals who have never gone through the election process. While it may be acceptable to grant this type of

統，提案罷免總統、副總統，議決總統、副總統彈劾案，修改憲法，複決憲法修正案暨對司法、考試及監察三院人事之同意等本質上屬於民意代表方能擁有之各款職權，非僅與憲法第二十五條構成明顯之規範衝突，抑且牴觸憲法第一條民主國之基本原則。是上述有關國民大會代表產生方式之增修條文，與民主之憲政秩序有違。或謂在國會採兩院制之國家，第一院固多屬民選產生，第二院則尚有由任命甚至世襲之議員組成者，則以一院依附於另一院已較任命或世襲者「民主性質」多矣。然查現代國家採兩院制之國會，其中一院若非由民選，其職權必遠遜於直接民選之一院，更無由民選產生之一院其權限為立法，依附之一院則有權制憲或修憲之理。況此種任命、世襲制度，或係基於歷史因素，或係出自聯邦體制，且已為現代大多數民主國家所不取。相關機關國民大會於八十九年三月二十三日向本院補提書面說明，一面舉出奧地利、荷蘭、比利時、愛爾蘭、瑞士、西班牙等國，謂此等國家之國會均設有兩院，且採比例代表制，一面謂國民大會採比例代表制係八十五年十二月國家發展會議之共識，符合國家發展需要等語。查上述國家之國會其一院雖採比例代表制，另一

representative consultative function, the fact that they can nevertheless exercise the powers fundamentally reserved for elected officials, [such as the power] to adjust the nation's territory under Article 4 of the Constitution, to vote to fill the vacancy of the office of the Vice President, to propose and cast votes on the bill of impeachment of the President or Vice President, to amend the Constitution, to ratify bills of constitutional amendments [approved by the Legislative Yuan] and to approve personnel appointments for the Judicial, Examination and Control Yuans, not only constitutes an apparent conflict of rules with Article 25 of the Constitution, but also contradicts the basic principle that the nation is a democratic republic under Article 1 of the Constitution.[13] Hence, the amended provisions on the installation of National Assembly delegates violate the constitutional order of democracy. There are still those who argue that in countries having two houses in

院均另行選舉或以其他方式產生，均無所謂依附式之比例代表方式，更無未經選舉者有權制定國家最高規範致違反民主國家基本原則之情形。至國家發展會議亦僅建議國民大會代表改採政黨比例代表方式，並未倡議國民大會代表既可本身不必舉行選舉，又得自行延任，從而相關機關所述各節，均不足作為國民大會代表改為依附方式產生之正當理由。又憲法第二十八條第二項每屆國民大會代表之任期，至次屆國民大會開會之日為止，旨在維持政權機關之連續性，此次修改既未停止上開第二十八條第二項之適用，又第一條第三項增訂「國民大會代表之任期為四年，但於任期中遇立法委員改選時同時改選」，則立法委員依增修條文第二條第五項規定，經總統解散時，國民大會代表亦同遭解散，規範內容相互矛盾，亦明顯可見。上開增修條文雖有以獨立參選之立法委員得票比例分配同屬獨立參選之國民大會代表當選名額之設計，但既屬獨立參選則不屬任何黨派或政團，自無共同之政策綱領可言，依附他人而獲得當

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[13] Article 1 of the Constitution provides, 'The Republic of China ... shall be a democratic republic of the people, to be governed by the people and for the people." Article 25 states, "The National Assembly shall, in accordance with the provisions of this Constitution, exercise political powers on behalf of the citizenry."

the parliament, representatives in one of the houses may be elected, appointed or may even inherit their offices, while members still exist in the other house, and this arrangement by no means diminishes the nature of democracy. Yet of modern states that adopt a bicameral legislature, if one house should be subject to no election, its powers and duties would be prone to be much less significant than those of the elected one, let alone any justification to grant the elected house legislative authority, whereas the non-elected house would have the power to establish and to amend the Constitution. Furthermore, the appointed or inherited system is the result of historical reasons or federal structure, and has not been adopted by the majority of modern democratic states. In its supplemental briefs of March 23, 2000, the Related Institution, the National Assembly, claimed on the one hand that countries like Austria, the Netherlands, Belgium, the Irish Republic, Switzerland and Spain, have adopted the system of two houses in their parliaments and proportional representation; on the other hand, the adoption of proportional representa-

選，則候選人無從以本身之理念與主張訴諸選民而獲選，於憲法所保障人民參政權之意旨不相符合。

tion by the National Assembly was [based upon] the consensus reached from the National Development Conference held in December 1996 to meet the demand of national development.[14] [Our] survey

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[14] In March 1996, the Republic of China held its first popular and direct election for its tenth President (which used to be elected by the National Assembly). Prior to the election, in an apparent attempt to sway the election outcome, the People's Republic of China launched a series of military maneuvers across the Taiwan Strait, including two missiles testing within the close range of Taiwan's territorial water. These actions created enormous tensions and uncertainties in Taiwan and strong reactions from the United States. However, the election went forward and Mr. Lee Tang-hui, China's least favored candidate, was elected (by 54% of the vote in a four-way race). Lee soon created a constitutional crisis by insisting on nominating his vice president, Mr. Lien Chien, to continue to be the Premier of the Executive Yuan. Although Lien's appointment was eventually approved by the Legislative Yuan (80 for, 65 opposed, and 3 abstention) in June, the issue of whether an incumbent Vice President may simultaneously serve as Premier under the Constitution, among other things, remained unresolved. This development quickly turned into a major political firestorm and resulted in a situation where the Premier was "disinvited" to offer his annual state of the country report before the Legislative Yuan. The entire interpellation and budgetary process (Article 57) was also seriously disrupted. This prompted more than 80 members of the Legislative Yuan to file petitions for a constitutional clarification and the Council of Grand Justices issued Inter pretation No. 419 on December 31, 1996, holding that although there is no direct prohibition in the Constitution against such appointment, it is nevertheless contrary to the structure, design and purpose of the Constitution. But before this Interpretation was issued, in an attempt to resolve this constitutional crisis politically, while taking advantage of his election mandate, Lee, who was also chairman of the KMT, called for a National Development Conference (not constitutionally sanctioned) in December 1996 to engage in political consultative process primarily with KMT's main opposition, the Democratic Progressive Party (DPP). A "consensus" entailing five points was reached (with the other major opposition, the New Party, and some other individuals boycotting) for future political reform: (1) the President shall appoint the Premier without the Legislative Yuan's approval; (2) the President shall have the power to dissolve the entire Legislative Yuan; (3) elections at the provincial level shall be "frozen;" (4) township or village chief executives shall be appointed; and (5) the Legislative Yuan shall have the power to dissolve the entire Executive Yuan (or the Cabinet). As a result, the incumbent and a very popular governor of the Taiwan Province, James C. Sung, announced his intention to resign in protest, setting off yet another political firestorm. Sung eventually broke off from the KMT and ran unsuccessfully for the 2000 presidential election. For details, see Government Information Office, THE REPUBLIC OF CHINA YEARBOOK 1996, Taipei, Taiwan: Shen's Art Printing Co., 1997, Appendix 1: Major Events.

shows that although one of the houses in those countries' parliaments does adopt the system of proportional representation, members of the other house are always determined by election or other means, and there is no such thing as the so-called proportional representation by way of attachment, let alone the situation where non-elected individuals are given the power to ordain and amend the supreme law of the nation, resulting in the violation of the basic principle of a democratic state.[15] Note that the National Development Conference only recommended that the National Assembly adopt the system of proportional representation. It did not propose that delegates of the National Assembly might be subject to no election and extend the term of service in their own right. Thus, there is neither any basis for the Related Institution's claims nor sufficient justification for the National Assembly to be changed to a system of proportional representation by way of attachment. The purpose of Article 28,

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[15] he so-called "apportionment by way of attachment" is referred to the arrangement in some of the two-houses parliament where the non-elected house (based upon the apportionment or quota system) is "attached" to the elected one.

Paragraph 2, of the Constitution is that the term of office of the delegates to each National Assembly shall terminate on the day on which the next National Assembly convenes and this is to maintain the continuity of that political entity. While the present amendment in question did not halt the application of this provision, it created yet another language "[t]he term of Delegates of the National Assembly shall be four years. In the event the election for Members of the Legislative Yuan shall take place in the midst of this term, Delegates shall be re-elected simultaneously." Hence, if and when the President dissolves the Legislative Yuan in accordance with Article 2, Paragraph 5, of the Amendments to the Constitution, the National Assembly shall also be dissolved simultaneously, and a clear conflict of rules is shown. Although the same provision [also] provides for the apportionment of independent candidates for the National Assembly based upon the votes received by independent members of the Legislative Yuan, it is incompatible with the Constitution's guarantee of the people's political right. This is because independ-

ent candidacy, by definition, is not affiliated with any particular political parties or groups, let alone a mutual political platform. [If this type of apportionment were permitted,] it would be as if a candidate won the election not based on his or her own ideas or platform, but by relying upon the winning quota of others.

The appropriateness of democratic representation hinges upon the fact that elected representatives duly execute the powers and faithfully abide by the agreements with their electorate [or constituency]. As far as the agreement is concerned, the most critical thing is to maintain the appropriateness of the agreement, unless there are justifications not to do so, to hold an election before the term expires. This is also the purpose of Interpretation No. 261 which states, "Regular elections of public representatives constitute the way to reflect public opinions and to exercise democratic constitutional rule of law." The justifications not to hold an election must be in compliance with Interpretation No. 31, "A major national incident rendering the conducting of the

按代議民主之正當性，在於民意代表行使選民賦予之職權須遵守與選民約定，任期屆滿，除有不能改選之正當理由外應即改選，乃約定之首要者，否則將失其正當性。本院釋字第二六一號解釋：「民意代表之定期改選，為反映民意，貫徹民主憲政之途徑」，亦係基於此一意旨。所謂不能改選之正當理由，須與本院釋字第三十一號解釋所指：「國家發生重大變故，事實上不能依法辦理次屆選舉」之情形相當。若任期屆滿，無故延任，則其行使職權已非選民所付託，於國民主權原則下民意代表之權限應直接源自國民賦予之理念不符，難謂具有正當性。本件國民大會修正通過之增修條文，將第四屆立法委員任期延長至九十一年六月三十日止，又將第三屆國民大會代表任期延至第四屆立法委員任期屆滿之日止，計立法委員

next election impossible as a matter of fact." An extension without cause after the term has expired is not justifiable as being appropriate because there is no longer any power bestowed upon the representatives by the electorate (or constituency) and it is incompatible with the principle of sovereignty of the people. In this case, the proposed amendment to the Amendments to the Constitution in question would have extended the term for members of the Fourth Legislative Yuan to June 30, 2002, and extended the term for delegates of the Third National Assembly to the expiration date of the members of the Fourth Legislative Yuan, that is, to extend the term of members of the Legislative Yuan by five months and the delegates of the National Assembly by two years and forty-two days. Based on the oral presentation by the representative of the Related Institution, the National Assembly, the term extension for members of the Legislative Yuan was supposed to coincide with the change of fiscal year so that newly elected members of the Legislative Yuan should have the power and opportunity to review the na-

延任五個月，國民大會代表則延長二年又四十二日。關於立法委員之延任，據相關機關國民大會指派之代表到院陳述，係基於配合會計年度之調整，俾新選出之立法委員有審議次年度中央政府預算而為之設計。惟查民意代表任期之延長須有前述不能依法改選之事由始屬正當，審議預算年度之調整與國家遭遇重大變故不能相提並論，其延任自屬欠缺正當性。況自八十六年增修條文施行後，立法院得因通過對行政院院長之不信任案，而遭總統解散，解散後重新選出之立法委員，其任期重新起算（上開條文第二條第五項），則未來各屆立法委員之任期可能起迄參差不一，是配合會計年度而調整任期勢將徒勞。而國民大會代表自行延任則謂出於實現改革國會之構想，並舉第一屆及第二屆國民大會代表亦有延長任期之情事云云。然所謂國會改革不外結構與功能兩方面之調整，觀乎本次憲法之增修，國民大會功能部分未見有任何變動，選舉方式之變更固屬結構之一環，此次修憲廢棄區域選舉而改採依附式之所謂「比例代表」，姑不論此種方式並非真正選舉，即使改變選舉方式，與任期延長亦無關聯，縱如相關機關所言，延任有助於國會改革，惟手段與其欲達成之目的並不

tional budget in the next fiscal year.[16] Yet term extension can be justified only if the previously indicated reason exists. Moreover, ever since the 1997 Amendments to the Amendments to the Constitution, the President may now dissolve the Legislative Yuan for the latter's passage of a bill of no confidence in the Executive Yuan. Newly elected members after the dissolution shall have a renewed term (Article 2, Paragraph 5, id.). Thus, there may be a situation where the length of term of future members of the Legislative Yuan is different from term to term, which makes the claims of matching the term with fiscal year adjustment futile. [The Related Institution further] claims that there are precedents for term extension, as in the First and Second National Assembly, and that the current self-granted extension is for the purpose of realizing the idea of parliamentary reform. However, parliamentary reform involves nothing but the adjustment of structural or functional as-

相當。至以往國民大會代表延任，或係發生於戒嚴及動員戡亂之非常時期，或係純屬總統、副總統改為直接民選，國民大會相關職權廢除後之配合措施，皆與本件情形有殊，不足以構成常態下之憲政先例。又利益迴避乃任何公職人員行使職權均應遵守之原則，憲法增修條文第八條：「國民大會代表及立法委員之報酬或待遇，應以法律定之。除年度通案調整者外，單獨增加報酬或待遇之規定，應自次屆起實施」，除揭示民意代表行使職權應遵守利益迴避原則外，復具舉輕明重之作用；蓋報酬或待遇之調整尚應自次屆起實施，則逕行延長任期尤與憲法本旨不符，聲請意旨指延長任期違反民主憲政之原理，與增修條文第八條產生矛盾，洵屬有理。

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[16] As of 2000, the fiscal year of all levels of government is adjusted from July 1, to the next June 30, to match the calendar year. As a transitional measure, fiscal year 1999 to 2000 in fact lasts one and a half years, from July 1, 1999 to December 31, 2000. See Article 10, Budget Law.

pects. A review of this most recent amending action to the Constitution reveals no change in the function of the National Assembly. On the structural aspect, while a change of election method is structural, the abandonment of election by the electorate (or constituency) and the switch to the so-called "apportionment representation" by way of attachment, whether or not it constitutes a real election, has nothing to do with term extension. Even if we assume the Related Institution is correct in that term extension is helpful for parliamentary reform, this purpose does not justify the means. As to the examples cited on term extension for previous delegates of the National Assembly, they either took place under extraordinary circumstances, such as [the imposition of] Martial Law and the Period of National Mobilization for Suppression of the Communist Rebellion, or were purely matching measures in light of abolishing certain powers of the National Assembly and changing the presidential and vice-presidential election process to a direct, popular vote. Both are different from the present case and cannot be considered as

constitutional precedents under normal circumstances. Moreover, to recuse in light of a conflict of interests is a principle that every public official must abide by. As Article 8 of the Amendments to the Constitution provides, "The remuneration or pay of the members of the Legislative Yuan shall be regulated by law. Except for general annual adjustments, individual regulations on increase of remuneration or pay shall take effect starting with that of the subsequent Legislative Yuan. This not only proclaims the principle that public representatives ought to disqualify themselves in light of conflict of interests, but serves as a lighting rod: even though the adjustment of remuneration or pay may not take effect until the next term, an outright term extension is especially not in conformity with the fundamental purpose of the Constitution. The petition is correct in pointing out that term extension violates the principle of democratic constitutional rule of law and that it creates a conflict with Article 8 of the Amendments to the Constitution.

The anonymous balloting by which 第三屆國民大會於八十八年九月

the Third National Assembly adopted to vote on the proposed amendments to Articles 1, 4, 9 and 10 of the Amendments to the Constitution in its 4th Session, 18th Conference on September 4, 1999, violated the principle of openness and transparency and the then-applicable Article 38, Paragraph 2, of the Regulation of the National Assembly Proceedings. The process was clearly and grossly flawed and in violation of the fundamental principles based upon which the provisions of the Constitution would take effect. Among the provisions in question, the contents of Article 1, Paragraphs 1 to 3, and Article 4, Paragraph 3, further conflict with the fundamental basis upon which the Constitution relies for its very existence, and are not permitted by a state of freedom and constitutional rule of law. As to Articles 9 and 10, while their contents are not in question, they shall nevertheless lose their effect since the process violates the due process in amending the Constitution. The aforementioned Articles 1, 4, 9, and 10 shall immediately become null and void as of the date this Interpretation is announced, and the text of the Amend-

四日第四次會議第十八次大會以無記名投票方式表決通過憲法增修條文第一條、第四條、第九條暨第十條之修正，其程序違背公開透明原則及當時適用之國民大會議事規則第三十八條第二項規定，其瑕疵已達明顯重大之程度，違反修憲條文發生效力之基本規範；其中第一條第一項至第三項、第四條第三項內容並與憲法中具有本質重要性而為規範秩序賴以存立之基礎，產生規範衝突，為自由民主憲政秩序所不許。至於第九條、第十條之修正內容本身雖無可議，然因其過程有違前述修憲正當程序，自應一併失其效力。上開修正之第一條、第四條、第九條暨第十條應自本解釋公布之日起失其效力，八十六年七月二十一日修正公布之原增修條文繼續適用。

ments to the Constitution promulgated on July 21, 1997, continues to be effective.

Justice Young-Mou Lin filed concurring opinion in part.

Justice Sen-Yen Sun filed concurring opinion in part.

Justice Jyun-Hsiung Su filed concurring opinion.

Justice Lai, In-Jaw filed concurring opinion.

Justice Chi-Nan Chen filed concurring opinion and dissenting opinion in part.

Justice Hua-Sun Tseng filed dissenting opinion.

本號解釋林大法官永謀、孫大法官森焱分別提出部分協同意見書；蘇大法官俊雄、賴大法官英照分別提出協同意見書；陳大法官計男提出協同意見書暨部分不同意見書；曾大法官華松提出不同意見書。

[Editor's Note] The issuance of this Interpretation came right after the 2000 presidential and vice-presidential elections. Because the National Assembly's intended constitutional amendments were declared unconstitutional, and in light of the imminent expiration of the terms of the existing delegates of the National Assembly (May 19, 2000),[17] it left only two

[17] Although Mr. Chen Shui-bian, the DPP candidate, won the presidential election on March 18, he carried only 39.3% of the total votes, and they are more or less concentrated in the southern part of Taiwan. Mr. James C. Sung, the independent candidate who broke rank with

options for the Executive Branch. Either the Central Election Committee could immediately sponsor a new round of national elections (which can be politically volatile right after the presidential election and impractical in terms of time and budget) or the National Assembly could call forth an extraordinary session to resolve the pending constitutional crisis. Owing in large part to the public pressure (especially the general public's highly critical and unfavorable attitude toward the National Assembly, with many questioning the value of its existence), the KMT and DPP reconvened another extraordinary session of the National Assembly and amended the Constitution again (signed by the President and promulgated on April 25, 2000). Under this latest amendment, the original term for the Third National Assembly delegates was restored and allowed to expire. The

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the KMT, received 36.84% of the vote, while Mr. Lien Chien, the incumbent Vice President and KMT's candidate, received 23.1% of the vote. To ensure that the momentum he gathered did not dissipate, Sung organized a new People's First Party immediately after the election and this instantaneously changed the political landscape of the island. While the KMT still enjoyed a large majority in the National Assembly, it is certainly not of KMT's interest to see a new round of election taken place so soon with a real possibility that it would lose control over that body.

National Assembly is now an ad hoc and "reactive" institution, with its delegates only being elected and called into session if and when there is a bill to amend the Constitution or to change the territory passed by the Legislative Yuan, among other things. The length of the term of the National Assembly Delegates shall be the same as that of the session (Article 2 of the Amendments to the Constitution). The Organic Act of the National Assembly must also be revised within two years of the date of the announcement of this Interpretation in light of this change.

J. Y. Interpretation No.500（April 7, 2000）*

ISSUE: Is it unconstitutional to levy business tax and entertainment tax on golf club membership fees or guarantee deposits?

RELEVANT LAWS:

Articles 7 and 19 of the Constitution（憲法第七條、第十九條）; J. Y. Interpretation No. 420（司法院釋字第四二〇號解釋）; Articles 1 and 3 of the Business Tax Act (營業稅法第一條、第三條).

KEYWORDS:

business tax（營業稅）, refundable（可退還的）, membership fee（入會費）, guarantee deposit（保證金）, sale of goods or services（銷售貨物或勞務）.**

HOLDING: According to Article 1 of the Business Tax Act, business tax shall be levied in accordance with the Business Tax Act on the sale of goods or services within the territory of the Republic of China. The laws involving taxation shall be interpreted in accordance with the legislative purpose of each of such laws based on the spirit of the prin-

解釋文：營業稅法第一條規定，在中華民國境內銷售貨物或勞務，均應依本法規定課徵營業稅。又涉及租稅事項之法律，其解釋應本於租稅法律主義之精神，依各該法律之立法目的，衡酌經濟上之意義及實質課稅之公平原則為之，亦經本院釋字第四二〇號解釋在案。財政部七十九年六月四日台財稅字第七九〇六六一三〇三號函釋

* Translated by Dr. C.Y. Huang of Tsar & Tsai Law Firm.

** Contents within frame, not part of the original text, are added for reference purpose only.

ciple of taxation by law, and take into consideration the economic meaning and the principle of equality in connection with substantive taxation. The above has been interpreted per J. Y. Interpretation No. 420. The Letter Ref. No. TTST-790661303 dated June 4, 1990, issued by the Ministry of Finance states: "For the membership fee or guarantee deposit paid to a golf course (club) by its members, if it is agreed in a contract that such fee/deposit is refundable upon withdrawal of membership after expiration of a specific period of time, and that such fee/deposit is not refundable upon withdrawal of membership before the expiration of a specific period of time, a uniform invoice shall be issued upon payment of the said fee/deposit on which business tax and entertainment tax shall be levied. When membership is actually withdrawn upon expiration of a specific period of time and membership fee or guarantee deposit is refunded, the golf course (club) is permitted to submit relevant documents to the authority in charge of tax levy to apply for return of the tax paid." The said directive is an interpretation with respect

示：「高爾夫球場（俱樂部）向會員收取入會費或保證金，如於契約訂定屆滿一定期間退會者，准予退還；未屆滿一定期間退會者，不予退還之情形，均應於收款時開立統一發票，課徵營業稅及娛樂稅。迨屆滿一定期間實際發生退會而退還入會費或保證金時，准予檢附有關文件向主管稽徵機關申請核實退還已納稅款。」係就實質上屬於銷售貨物或勞務代價性質之「入會費」或「保證金」如何課稅所為之釋示，並未逾越營業稅法第一條課稅之範圍，符合課稅公平原則，與上開解釋意旨無違，於憲法第七條平等權及第十九條租稅法律主義，亦無牴觸。

to how the tax on a "membership fee" or "guarantee deposit," which is a consideration for sale of goods or services in nature, should be imposed. This is within the taxation scope prescribed in Article 1 of the Business Tax Act, meets the principle of fair taxation, conforms to the Interpretation mentioned above, and does not contradict the equal rights under Article 7 and the principle of taxation by law under Article 19 of the Constitution.

REASONING: Article 1 of the Business Tax Act stipulates: "Business tax shall be levied in accordance with this Law on the sale of goods or services within the territory of the Republic of China and the import of goods." According to Article 3, Paragraphs 1 and 2, of the same Act, the term "sale of goods" refers to the transfer of ownership of goods to others for a consideration, and the term "sale of services" refers to the supply of services to others or the provision of goods for the use or collection of proceeds by others for a consideration. The business revenue of a payer of business tax refers to the total consideration received

解釋理由書：營業稅法第一條規定：「在中華民國境內銷售貨物或勞務及進口貨物，均應依本法規定課徵營業稅。」依同法第三條第一項及第二項規定，銷售貨物，係指將貨物之所有權移轉與他人，以取得代價者；銷售勞務，則為提供勞務予他人，或提供貨物與他人使用、收益，以取得代價者而言。營業稅納稅義務人之營業額，為納稅義務人轉讓貨物或提供勞務向對方收取之全部代價，包括價款及其他實質上屬於代價性質之入會費或保證金等在內。所收入會費及保證金等，依約定屆期應退還者，於實際退還時，稽徵機關前收入會費及保證金等營業額所含營業稅，應予退還。本於租稅法律主義及課

by the taxpayer from counterparties for transferring goods or provision of services, including prices and other membership fees or guarantee deposits equivalent to consideration. For the membership fee or guarantee deposit already received, if it is agreed that such fee/deposit should be refunded upon the expiration of a period of time, when the said fee/deposit is actually refunded, the business tax included in the business revenue from membership fees and guarantee deposit formerly received by the tax levying authority shall be refunded. Based on the principle of taxation by law and the principle of taxation fairness, if the payment is made in the name of a "guarantee deposit" and if it is actually a consideration for sale of goods or services, the business tax shall still be levied in accordance with the abovementioned Business Tax Act.

稅公平之原則，如名目雖為「保證金」，惟實際上係屬銷售貨物或勞務之代價，則仍應依前開營業稅法規定課徵營業稅。

As interpreted in J.Y. No. 420, the laws involving taxation shall be interpreted in accordance with the legislative purpose of each of such laws based on the spirit of the principle of taxation by law, and take into consideration the economic

涉及租稅事項之法律，其解釋應本於租稅法律主義之精神，依各該法律之立法目的，衡酌經濟上之意義及實質課稅之公平原則為之，業經本院釋字第四二〇號解釋在案。財政部七十九年六月四日台財稅字第七九〇六六一三〇三

meaning and the principle of equality in connection with substantive taxation. The Letter Ref. No. TTST- 790661303 dated June 4, 1990, issued by the Ministry of Finance states: “For the membership fee or guarantee deposit paid to a golf course (club) by its members, if it is agreed in a contract that such fee/deposit is refundable upon withdrawal of membership after expiration of a specific period of time, and that such fee/deposit is not refundable upon withdrawal of membership before the expiration of a specific period of time, a uniform invoice shall be issued upon payment of the said fee/deposit on which business tax and entertainment tax shall be levied. When membership is actually withdrawn upon expiration of a specific period of time and membership fee or guarantee deposit is refunded, the golf course (club) is permitted to submit relevant documents to the authority in charge of tax levy to apply for return of the tax paid.” The purpose of levying business tax on a membership fee or guarantee deposit and allowing refund of the tax levied on the amount which is guarantee deposit in substance is to enforce the Business

號函釋：「高爾夫球場（俱樂部）向會員收取入會費或保證金，如於契約訂定屆滿一定期間退會者，准予退還；未屆滿一定期間退會者，不予退還之情形，均應於收款時開立統一發票，課徵營業稅及娛樂稅。迨屆滿一定期間實際發生退會而退還入會費或保證金時，准予檢附有關文件向主管稽徵機關申請核實退還已納稅款。」其先就營業人所收取之入會費或保證金課徵營業稅，再就實質上屬於保證金性質之款項課徵之稅額准予退還，係為貫徹營業稅法之執行，確實稽查課稅之方法，以杜巧立名目之迴避稅捐行為。是基於公平課稅原則，營業人實際上從事營業行為收取之款項，屬於銷售貨物或勞務之代價者，應依法課稅。財政部上開函釋係就實質上屬於銷售貨物或勞務對價性質之「入會費」或「保證金」如何課稅所為之釋示，並未逾越營業稅法第一條課稅之範圍，符合課稅公平原則，與上開解釋意旨無違，於憲法第七條平等權及第十九條租稅法律主義，亦無牴觸。

Tax Act, to audit the taxation method, and to prevent the act of circumventing tax under all sorts of guises. Based on the principle of fair taxation, payments collected by a business entity for business transaction, if falling under the consideration of sale of goods or services, shall be subject to tax in accordance with law. The said directive of the Ministry of Finance is an interpretation with respect to how the tax on a "membership fee" or "guarantee deposit," which is a consideration for sale of goods or services in nature, should be imposed. This is within the taxation scope prescribed in Article 1 of the Business Tax Act, meets the principle of fair taxation, conforms to the Interpretation mentioned above, and does not contradict the equal rights under Article 7 and the principle of taxation by law under Article 19 of the Constitution.

Justice Jyun-Hsiung Su filed dissenting opinion in part.

本號解釋蘇大法官俊雄提出部分不同意見書。

J. Y. Interpretation No.501（April 7, 2000）*

ISSUE: (1) Does Article 7 of the Regulation Governing the Recognition of Seniority of Personnel Transferred between Administrative Agencies, Public Schools and Public Enterprises for the Purpose of Accessing Office Ranking and Level Ranking exceed the scope of statutory delegation in Article 16 of the Public Functionaries Appointment Act?

(2) Does Article 15, Paragraph 3 of the Enforcement Rules of the Public Functionaries Remuneration Act contradict Article 16 of the Public Functionaries Remuneration Act, or Article 11 of the Standard Act for the Laws and Rules, or Article 7 of the Constitution?

RELEVANT LAWS:

Article 7 of the Constitution（憲法第七條）; Article 16 of the Public Functionaries Appointment Act（公務人員任用法第十六條）; Articles 2, 9 and 16 of the Public Functionaries Remuneration Act（公務人員俸給法第二條、第九條、第十六條）; Articles 4, Paragraph 3, and 15 of the Enforcement Rules of the Public Functionaries Remuneration Act（公務人員俸給法施行細則第四條第三項、第十五條）; Article 11 of the Standard Act for the Laws and Rules（中央法規標準法第十一條）; Article 7 of the Regulation Governing the Rec-

* Translated by Eric Yao-kuo Chiang.

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ognition of Seniority of Personnel Transferred between Administrative Agencies, Public Schools and Public Enterprises for the Purpose of Accessing Office Ranking and Level Ranking（行政、教育、公營事業人員相互轉任採計年資提敘官職等級辦法第七條）.

KEYWORDS:

public functionaries（公務人員）, civil servants（專業人員）, appointment（任用）, qualification（資格）, seniority（年資）, remuneration（俸給）, transfer（轉任）, administrative agency（行政機關）, public school（公立學校）, public enterprise（公營事業）.**

HOLDING: Based on the delegation in Article 16 of the Public Functionaries Appointment Act, the Regulation Governing the Recognition of Seniority of Personnel Transferred between Administrative Agencies, Public Schools and Public Enterprises for the Purpose of Accessing Office Ranking and Level Ranking (hereinafter "the Regulation") were promulgated. The purpose of the Regulation is to facilitate transfer of civil servants who are of different appointment categories (i.e., administrative agencies, public schools and state-owned enterprises) and

解釋文：行政、教育、公營事業人員相互轉任採計年資提敘官職等級辦法係依公務人員任用法第十六條授權訂定，旨在促使行政、教育、公營事業三類不同任用制度間，具有基本任用資格之專業人員相互交流，以擔任中、高級主管職務。該辦法第七條規定，為上開三類人員相互轉任採計年資、提敘官職等級之標準所必須，符合法律授權之意旨，且係為配合公務人員俸給法第二條、第九條暨其施行細則第四條第三項、第十五條所訂定。又中華民國七十六年一月十四日發布之公務人員俸給法施行細則第十五條第三項，係因不同制

of the same basic qualifications so that the persons transferred may serve as mid-level or high-level executive officials [in other categories]. In order to provide standards for recognition of seniority and office and level ranking of the transferred personnel among the three appointment categories, Article 7 of the Regulation is necessary and within the scope of statutory delegation. The article also coordinates Articles 2 and 9 of the Public Functionaries Remuneration Act and Article 4, Paragraph 3, and Article 15 of the Enforcement Rules of the Public Functionaries Remuneration Act. Furthermore, Article 15, Paragraph 3, of the Enforcement Rules of the Public Functionaries Remuneration Act (promulgated on January 14, 1987) is needed because, originally, different sets of rules regarding appointment, level of remuneration, and evaluation applied to persons of different appointment categories and therefore, when a person was transferred from one category to another, there was no rule to apply regarding level of remuneration. The said paragraph was promulgated in consideration of the equity of the personnel. It contradicts nei-

度人員間原係適用不同之任用、敘薪、考績（成）、考核等規定，於相互轉任時，無從依其原敘俸（薪）級逕予換敘，基於人事制度之衡平性所為之設計，均未違背公務人員俸給法第十六條及中央法規標準法第十一條之規定，與憲法第七條亦無牴觸。惟前開辦法第七條規定轉任人員採計年資僅能至所敘定職等之本俸（薪）最高級為止，已與八十四年十二月二十六日以還歷次修正發布之公務人員俸給法施行細則按年核計加級，均以至其所敘定職等之年功俸最高級為止之規定，有欠一致，應予檢討改進。

ther Article 16 of the Public Functionaries Remuneration Act nor Article 11 of Standard Act for the Laws and Rules, nor does it violate Article 7 of the Constitution. However, according to Article 7 of the Regulation, the years of service of the transferred personnel may be counted only to the highest level of basic salary (ben-feng) of their level ranking. This Article is not consistent with a provision, effective December 26, 1995, as amended, in the Enforcement Rules of the Public Functionaries Remuneration Act. In the provision, yearly remuneration advancements may be counted to the highest level of the seniority salary (nian-gong-feng) of their level ranking. Therefore, this inconsistency shall be reconsidered and corrected.

REASONING: For the purposes of enhancing personnel transfer, recruiting professionals, and raising morale of civil servants, those civil servants of same appointment qualifications, with similar tasks, and of same ranking may be transferred [between administrative agencies, public schools or state-owned enter-

解釋理由書：基本任用資格相同且性質相近、官職等級相當之公務人員，得相互轉任，為暢通人事交流、廣攬專業人才及鼓勵公務人員士氣所必須，惟其資格、範圍應有明確之規定，且年資、官等、職等之提敘，亦應予以保障。公務人員任用法第十六條規定：「高等考試或特種考試之乙等考試及格

prises.] However, the qualifications and extent of transfer should be specified in law. Furthermore, seniority, office ranking and level ranking [of the transferred personnel] should be guaranteed. Article 16 of the Public Functionaries Appointment Act provides: "Persons, who have passed Superior Examination or Type B of Special Examination and serve in administrative agencies, public schools or public enterprises, may be transferred. The years of service of those persons may be recognized for the purposes of accessing their office ranking and level ranking while transferring to their new positions of similar qualifications and level. [An implementation] rule shall be promulgated by the Examination Yuan." Based on the delegation, the Regulation Governing the Recognition of Seniority of Personnel Transferred between Administrative Agencies, Public Schools and Public Enterprises for the Purpose of Accessing Office Ranking and Level Ranking ("the Regulation") was promulgated. The purpose of the Regulation is to facilitate transfer among civil servants who are of different appointment categories (i.e., ad-

人員，曾任行政機關人員、公立學校教育人員或公營事業人員服務成績優良之年資，於相互轉任性質程度相當職務時，得依規定採計提敘官、職等級，其辦法由考試院定之。」行政、教育、公營事業人員相互轉任採計年資提敘官職等級辦法即係依上開法律之授權所訂定，旨在促使行政、教育、公營事業三類不同任用制度間，具有相同基本任用資格且官職等級相當之專業人員相互交流，以擔任中、高級主管。該辦法第七條規定：「轉任人員轉任前服務年資，除依本辦法第五條、第六條規定採計取得所轉任職務官等職等之任用資格外，如尚有與轉任職務性質相近、等級相當且服務成績優良之年資，得按每一年（年度）提敘俸（薪）級一級，至敘定職等之本俸（薪）最高級為止」，為上開三類人員相互轉任採計年資、提敘官職等級之標準所必須，符合法律授權之意旨。又七十六年一月十四日發布之公務人員俸給法施行細則第十五條第三項規定：「前二項之按年核計加級，均以至其所敘定職等之本俸最高級為止」，係因不同制度人員間原係適用不同之任用、敘薪、考績（成）、考核等規定，於相互轉任時，無從依其原敘俸（薪）級逕予換敘，基於人事制度之衡平性所

ministrative agencies, public schools, and public enterprises) and are of same basic qualifications, office ranking and level ranking so that the persons transferred may serve as mid-level or high-level executive officials [in other categories]. Article 7 of the Regulation reads: "Except for personnel's qualifications, office ranking and level ranking accredited pursuant to Articles 5 and 6 of the Regulation, personnel's years of service before transfer that were evaluated as "good" and that are of similar nature to his new position and of same ranking may be accredited. Each year of service may be counted as one level of advancement for his salary to the highest level of basic salary (ben-feng) of his new level ranking." In order to provide standards for recognition of seniority and office and level ranking of the transferred personnel among three appointment categories, this Article is necessary and within the scope of statutory delegation. Furthermore, Article 15, Paragraph 3 of the Enforcement Rules of the Public Functionaries Remuneration Act (effective January 14, 1987) provides: "The yearly remuneration advancements in the preced-

為之設計，均未違背公務人員俸給法第十六條及中央法規標準法第十一條之規定，與憲法第七條亦無牴觸。惟前開辦法第七條規定轉任人員採計年資僅能至所敘定職等之本俸（薪）最高級為止，已與八十四年十二月二十六日以還歷次修正發布之公務人員俸給法施行細則按年核計加級，均以至其所敘定職等之年功俸最高級為止之規定（八十四年十二月二十六日及八十七年一月十五日修正者均為第十五條第三項、八十八年十一月二十五日修正者為第十五條第一項），有欠一致，應予檢討改進。

ing two paragraphs may be counted only to the highest level of basic salary (ben-feng) of his new level ranking." This paragraph is needed because different sets of rules regarding appointment, level of remuneration, and evaluation apply to persons of different appointment categories and therefore, when a person was transferred from one category to the other, there was no rule regarding level of remuneration to apply. The paragraph was promulgated in consideration of the equity of the personnel. The paragraph contradicts neither Article 16 of the Public Functionaries Remuneration Act nor Article 11 of the Standard Act for the Laws and Rules. The paragraph does not violate Article 7 of the Constitution either. However, according to Article 7 of the Regulation, years of service of the transferred personnel may be counted only to the highest level of basic salary (ben-feng) of his level ranking. This article is not consistent with a provision, effective on December 26, 1995, in the Enforcement Rules of the Public Functionaries Remuneration Act (on December 26, 1995 and January 15, 1998 was amended as Article

15, paragraph 3; on November 15, 1999 was amended as Article 15, Paragraph 1). In the provision, yearly remuneration advancements may be counted to the highest level of seniority salary (nian-gong-feng) of his level ranking. This inconsistency shall be reconsidered and corrected.

J. Y. Interpretation No.502（April 7, 2000）*

ISSUE: Where the Civil Code mandates that the adopter should be more than twenty years older than the adoptee, is it constitutional to have the said provision strictly enforced in case both spouses co-adopt or one spouse adopts the other spouse's child/children?

RELEVANT LAWS:

Articles 22 and 23 of the Constitution（憲法第二十二條、第二十三條）; Articles 1073 and 1079-1 of the Civil Code（民法第一千零七十三條、第一千零七十九條之一）.

KEYWORDS:

adoption（收養）, Chinese family ethics（家庭倫理）, family well being（家庭幸福）, age difference（年齡差距）, social order（社會秩序）, public interests（公共利益）.**

HOLDING: Article 1073 of the Civil Code stipulates that the adopter should be twenty or more years older than the adoptee, and Article 1079-1 stipulates that adoption in violation of Article 1073 is null and void. The provisions are not only in harmony with Chinese family

解釋文：民法第一千零七十三條關於收養者之年齡應長於被收養者二十歲以上，及第一千零七十九條之一關於違反第一千零七十三條者無效之規定，符合我國倫常觀念，為維持社會秩序、增進公共利益所必要，與憲法保障人民自由權利之意旨並無牴觸。收養者

* Translated by Professor Dr. Amy H.L. SHEE.

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ethics but also essential for the maintenance of the social order and the improvement of public interest. Hence, such laws are not in contravention with the intent of the Constitution to protect the people's right to freedom. However, though the reasonableness of the age difference between the adopter and the adoptee is a matter of legislative discretion, in order to uphold family harmony and to protect the adoptee's right, the above stipulations should be amended to offer flexibility in the arrangement of the practical needs of social subsistence, especially in cases where two spouses co-adopt or one spouse adopts the other's child\children. Accordingly, the relevant authorities shall examine and amend such laws.

與被收養者之年齡合理差距，固屬立法裁量事項，惟基於家庭和諧並兼顧養子女權利之考量，上開規定於夫妻共同收養或夫妻之一方收養他方子女時，宜有彈性之設，以符合社會生活之實際需要，有關機關應予檢討修正。

REASONING: Article 1073 of the Civil Code requires that the adopter should be more than twenty years older than the adoptee and Article 1079-1 stipulates that any adoption that is not in accord with Article 1073 is null and void. The law rendering restrictions on the age difference between the adopter and the adoptee respects the Chinese tradition on

解釋理由書：民法第一千零七十三條關於收養者之年齡應長於被收養者二十歲以上，及第一千零七十九條之一關於違反第一千零七十三條者無效之規定，乃以尊重世代傳統，限制收養者與被收養者之年齡差距，符合我國倫常觀念，為維持社會秩序、增進公共利益所必要，與憲法保障人民自由權利之意旨並無牴觸。收養者與被收養者之年齡

generational ethics, and thus corresponds with family moral values. They are considered essential for the maintenance of the social order and the improvement of public interest. Hence, such laws are not in conflict with the intent of the Constitution to protect the people's right to freedom. Although the reasonableness of the age difference between the adopter and the adoptee is a matter of legislative discretion, it must also be considered that the main aspiration of the existing legal adoption system is to protect the adoptee's right, and that parent-child relationships are becoming more and more sophisticated in contemporary, pluralistic society. In cases where two spouses co-adopt or one spouse adopts the other's child\children in violation of Article 1073 and thus invalidate(s) the adoption, the law may actually contravene not only the adoptee's interests but also the family's well-being. In order to uphold family harmony and to protect the adoptee's rights, the above provisions: "the adopter should be more than twenty years older than the adoptee, a violation of which invalidates the adoption" should be amended to offer flexibil-

合理差距，固屬立法裁量事項，惟現行收養制度以保護養子女之利益為宗旨，而現實多元化社會親子關係漸趨複雜，就有配偶者共同收養或收養他方配偶之子女情形，如不符民法第一千零七十三條規定致收養無效時，反有損被收養人之利益，影響家庭幸福。基於家庭和諧並兼顧養子女權利之考量，上開關於收養者之年齡應長於被收養者二十歲以上之規定，於夫妻共同收養或夫妻之一方收養他方子女時，宜有彈性之設，以符合社會生活之實際需要，有關機關應予檢討修正。

ity and meet the practical needs of society, especially in cases where two spouses co-adopt or one spouse adopts the other's child\ children. Therewith, the relevant authorities shall examine and amend such laws.

J. Y. Interpretation No.503（April 20, 2000）*

ISSUE: Where violation of a duty to act simultaneously constitutes a part of the tax evasion act, and the punishment thereof is equivalent to that for such tax evasion act, is it constitutionally permissible to impose punishment upon both of the above or only to impose the severer punishment?

RELEVANT LAWS:

Article 44 of the Tax Evasion Act（稅捐稽徵法第四十四條）; Articles 45, 49 and 51 of the Business Tax Act（營業稅法第四十五條、第四十九條、第五十一條）.

KEYWORDS:

double punishment（重複處罰）, double jeopardy（重複追訴）, rule-of-law nation（法治國）.**

HOLDING: In the case where the taxpayer is to be punished when violating the duty to act, it is only required that such taxpayer shall be fined for non-compliance with the duty to act. Where the taxpayer is to be punished for tax evasion, it is essential that the legal perquisites of the tax evasion facts be met.

解釋文：納稅義務人違反作為義務而被處行為罰，僅須其有違反作為義務之行為即應受處罰；而逃漏稅捐之被處漏稅罰者，則須具有處罰法定要件之漏稅事實方得為之。二者處罰目的及處罰要件雖不相同，惟其行為如同時符合行為罰及漏稅罰之處罰要件時，除處罰之性質與種類不同，必須採用不同之

* Translated by Professor Fuldien Li.

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Although the purpose and requirements of the above two are different, there cannot be double punishment by various measures and means unless such act complies with the requirements of both of the above and the difference in the punitive measures and means is necessary to achieve the purpose of the administration, which is the fundamental principle of a modern democratic state governed by the rule of law *(Rechtsstaat)*. Therefore, when violation of such duty to act simultaneously constitutes a part of the tax evasion act or such kind of punishment is equivalent to that of such tax evasion act, if imposition of the most severe of the prescribed punishments will achieve the purpose of the administration, there shall not be further punishment so as to be consistent with the intent of the Constitution to protect the rights of the people. J.Y. Interpretation No. 356 shall accordingly be appended.

處罰方法或手段，以達行政目的所必要者外，不得重複處罰，乃現代民主法治國家之基本原則。是違反作為義務之行為，同時構成漏稅行為之一部或係漏稅行為之方法而處罰種類相同者，如從其一重處罰已足達成行政目的時，即不得再就其他行為併予處罰，始符憲法保障人民權利之意旨。本院釋字第三五六號解釋，應予補充。

REASONING: A party filed a petition requesting supplemental interpretation owing to an ambiguity arising from the application of the Judicial Interpretation regarding the final binding judgment.

解釋理由書：按當事人對於確定終局裁判所適用之本院解釋，發生疑義，聲請補充解釋，經核確有正當理由者，應予受理。本件聲請人因營業稅事件，經行政法院確定終局判決引用本院

At this petition at bar concerning a business tax matter, the petitioner's case has been adjudicated in a final and binding judgment by the Administrative Court that applied Interpretation No. 356 so as to render a final and binding judgment. However, such Interpretation does not clearly explain whether the punishments should be combinable or the most severe of the prescribed punishments should be imposed when the taxpayer violates the duty to act and commits tax evasion; therefore, a petition requesting supplemental interpretation initially has justifiable ground.

釋字第三五六號解釋作為判決之依據，惟該號解釋對納稅義務人違反作為義務被處行為罰與因逃漏稅捐而被處漏稅罰，究應併合處罰或從一重處斷，並未明示，其聲請補充解釋，即有正當理由，合先敘明。

If an act in violation of taxation duty involves several penalties, whether those penalties can be imposed on such act jointly, the result will be different depending upon the manner of such act, and the classification and purpose of punishment; needless to say, a taxpayer can receive combinable punishments in the event that the results of the punishments should vary when numerous acts have de facto violated several articles. Nevertheless, an act by the taxpayer may meet both the re-

違反租稅義務之行為，涉及數處罰規定時可否併合處罰，因行為之態樣、處罰之種類及處罰之目的不同而有異，如係實質上之數行為違反數法條而處罰結果不一者，其得併合處罰，固不待言。惟納稅義務人對於同一違反租稅義務之行為，同時符合行為罰及漏稅罰之處罰要件者，例如營利事業依法律規定應給與他人憑證而未給與，致短報或漏報銷售額者，就納稅義務人違反作為義務而被處行為罰與因逃漏稅捐而被處漏稅罰而言，其處罰目的及處罰要件，

quirements of the violation of the duty to act and the act of tax evasion; for example, a business entity does not report or underreports a sales amount owing to failure to turn over the documentary evidence to the relevant authority. When it is a matter of the punishment for the breach of the duty to act and that of the act of tax evasion regarding the above, the purposes and the requirements of the punishments are different; the former punishes the breach of the duty to act, while the latter punishes the tax evasion that meet with the legal perquisites of punishment. This is apart from the fact that applying different means to punish in combination is necessary to achieve the purpose of the administration, in case the nature and classification of the two are different; for example, one may be a fine, the other a confiscation, or one may be a fine, the other a suspension of business, etc. There cannot be double punishment, which would be contrary to the fundamental principle of a modern democratic state governed by the rule of law *(Rechtsstaat)*. Hence, when violation of such duty to act simultaneously constitutes a part of the

雖有不同，前者係以有違反作為義務之行為即應受處罰，後者則須有處罰法定要件之漏稅事實始屬相當，除二者處罰之性質與種類不同，例如一為罰鍰、一為沒入，或一為罰鍰、一為停止營業處分等情形，必須採用不同方法而為併合處罰，以達行政目的所必要者外，不得重複處罰，乃現代民主法治國家之基本原則。從而，違反作為義務之行為，如同時構成漏稅行為之一部或係漏稅行為之方法而處罰種類相同者，則從其一重處罰已足達成行政目的時，即不得再就其他行為併予處罰，始符憲法保障人民權利之意旨。本院釋字第三五六號解釋雖認營業人違反作為義務所為之制裁，其性質為行為罰，此與逃漏稅捐之漏稅罰乃屬兩事，但此僅係就二者之性質加以區別，非謂營業人違反作為義務之行為罰與逃漏稅捐之漏稅罰，均應併合處罰。在具體個案，仍應本於上述解釋意旨予以適用。本院前開解釋，應予補充。

tax evasion or the punishment is equivalent to that of such tax evasion conduct, if imposition of the most severe of the prescribed punishments will be able to achieve the purpose of the administration, other acts shall not be punished so as to be consistent with the intent of the Constitution to protect the rights of the people. Although Interpretation No. 356 held that the taxpayer should be punished for breaching the duty to act, punishment of such conduct shall be distinguished from the penalty for tax evasion. Said Interpretation only distinguished between the nature of those two, but did not intend that the punishments should be combined simultaneously in every instance. The intent of such Interpretation shall be applied and construed on a case-by-case basis. Accordingly, J.Y. Interpretation No. 356 shall be appended as mentioned above.

Justice Hua-Sun Tseng filed concurring opinion.

本號解釋曾大法官華松提出協同意見書。

J. Y. Interpretation No.504（May 5, 2000）*

ISSUE: Article 70 of the Precautionary Matters on Handling Compulsory Enforcement provides that in case an asset under provisional attachment or disposition is acquired by a government agency, the court shall require the amount of payment or compensation thereof to be lodged. Does the said provision conflict with the Compulsory Enforcement Act, thus contravening the constitutional protection of the people's property rights?

RELEVANT LAWS:

Article 15 of the Constitution（憲法第十五條）; Articles 12, 14, 14-1, 51, 113, 134 and 140 of the Compulsory Enforcement Act（強制執行法第十二條、第十四條、第十四條之一、第五十一條、第一百十三條、第一百三十四條及第一百四十條）; Article 5 of the Standard Act for the Laws and Rules（中央法規標準法第五條）; Articles 225, 881 and 899 of the Civil Code（民法第二百二十五條、第八百八十一條、第八百九十九條）; Article 70 of the Precautionary Matters on Handling Compulsory Enforcement（辦理強制執行事件應行注意事項第七十點）.

KEYWORDS:

provisional attachment（假扣押）, preliminary injunction（假處分）, requisition（徵收）, substitutional object（代位物）, substitutional interest（代替利益）.**

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* Translated by Dr. C.Y. Huang of Tsar & Tsai Law Firm.

** Contents within frame, not part of the original text, are added for reference purpose only.

HOLDING: Article 70 of the Precautionary Matters on Handling Compulsory Enforcement as amended and promulgated on November 11, 1996, by the Judicial Yuan stipulates: "In the case where an asset under provisional attachment or preliminary injunction is acquired by a government agency through compulsory procurement or requisition, the enforcement court shall lodge the payment or compensation amount for the said asset." The aforesaid has been elaborated in J. Y. Interpretation Yuan-tze No. 2315. The purpose of the said provision is to make it clear that the effect of the original order of attachment, which prohibits the debtor from freely disposing of an asset, extends to the substitutional object or interest after the said asset is acquired by a government agency through compulsory procurement or requisition, so as to preserve for the creditor the realization of a claim of rights in the future. The lodgment does not have the effect of causing the extinction of debts. Furthermore, there is no separate restriction on the rights and interests of the debtor, nor would he/she be placed at a disadvantage. This is in

解釋文：司法院於中華民國八十五年十一月十一日修正發布之辦理強制執行事件應行注意事項第七十點規定：「在假扣押或假處分中之財產，如經政府機關依法強制採購或徵收者，執行法院應將其價金或補償金額提存之」，此一旨意曾經本院院字第二三一五號解釋在案，其目的僅在宣示原查封禁止債務人任意處分財產之效力，繼續存在於該財產因政府機關強制購買或徵收後之代位物或代替利益，以保全債權人將來債權之實現，尚不因提存而生債務消滅之效果，且未另外限制債務人之權利，或使其陷於更不利之地位，符合強制執行法第五十一條、第一百十三條、第一百三十四條、第一百四十條規定之意旨，自無牴觸中央法規標準法第五條規定可言，與憲法保障人民財產權之本旨亦無違背。

conformity with the purposes of Articles 52, 113, 134 and 140 of the Compulsory Enforcement Act. In connection with the aforesaid, there is no contradiction with Article 5 of the Standard Act for the Laws and Rules and the constitutional purpose of protecting the property right of the people.

REASONING: The preventive proceedings, which prohibit the debtor from transferring ownership of his/her property, are for the purpose of preserving for the creditor the realization of a claim in the future. This is necessary to maintain the social order and promote the public interest. Although it is impossible to prevent the government from acquiring the asset under provisional attachment or preliminary injunction by compulsory procurement or requisition, the payment or compensation amount for the said asset could be treated as substitutional object or interest. With reference to the purposes of Paragraph 2 of Article 225, Articles 881 and 899 of the Civil Code, and the purposes of Articles 51, 113, 134 and 140 of the Compulsory Enforcement Act, the

解釋理由書：禁止債務人移轉財產權之保全程序，係在保全債權人本案債權將來終局實現之先行強制執行程序，為維持社會秩序，增進公共利益所必要。在假扣押或假處分中之財產，雖不能阻止政府機關依法強制購買或徵收，但其價金或補償金仍不失為保全財產之代位物或代替利益，徵諸民法第二百二十五條第二項、第八百八十一條、第八百九十九條之法理，及強制執行法第五十一條、第一百十三條、第一百三十四條、第一百四十條規定之意旨，原假扣押、假處分查封禁止債務人移轉財產權之效力，自仍應及於該強制購買之價金或徵收之補償金，本院對此曾著有院字第二三一五號解釋，此時假處分程序轉換為假扣押程序，乃屬當然。辦理強制執行事件應行注意事項第七十點規定：「在假扣押或假處分中之財產，如

sequestration effect of the original provisional attachment or preliminary injunction prohibiting the debtor from transferring ownership of his/her property should naturally extend to payment for compulsory procurement or the compensation amount for the requisition. The aforesaid has been elaborated in J. Y. Interpretation No. 2315. At this point, the preliminary injunction proceedings naturally change to the provisional attachment proceedings. Article 70 of Precautionary Matters on Handling Compulsory Enforcement as amended and promulgated on November 11, 1996, by the Judicial Yuan provides: "In the case where an asset under provisional attachment or preliminary injunction is acquired by a government agency through compulsory procurement or requisition, the enforcement court shall lodge the payment or compensation amount for the said asset." The purpose of the said provision is to make it clear that the effect of the original order of attachment, which prohibits the debtor from freely disposing of an asset, extends to the substitutional object or interest after the said asset is acquired by the government agency

經政府機關依法強制採購或徵收者，執行法院應將其價金或補償金額提存之」，目的僅在宣示原查封禁止債務人任意處分財產之效力，繼續存在於該財產因政府機關強制購買或徵收後之代位物或代替利益，以保全債權人將來債權之實現，尚不因提存而生債務消滅之效果，且未另外限制債務人之權利，或使其陷於更不利之地位，符合強制執行法上開規定之旨意，自無牴觸中央法規標準法第五條規定可言，與憲法保障人民財產權之意旨亦無違背。至因假扣押、假處分查封債務人財產後，若因強制購買或徵收後，已不能由其代位物或代替利益達成保全之目的者，則屬債務人可否依強制執行法第十二條、第十四條及第十四條之一聲明異議或提起債務人異議之訴問題，併予指明。

through compulsory procurement or requisition, so as to preserve for the creditor the realization of obligatory rights in the future. The lodgment does not have the effect of causing the extinction of debts. Furthermore, there is no separate restriction on the rights and interests of the debtor, nor would the debtor be placed at a disadvantage. This is in conformity with the purposes of the aforesaid Articles of the Compulsory Enforcement Act. In connection with the aforesaid, there is no contradiction with Article 5 of the Standard Act for the Laws and Rules and the constitutional purpose of protecting the property right of the people. In the case where an asset of the debtor under provisional attachment or preliminary injunction goes through compulsory procurement or requisition, and consequently, the substitutional object or interest cannot be used to achieve the preventive purpose, the issue will be whether the debtor may file objection or institute an objection suit as provided in Articles 12, 14 and 14-1 of the Compulsory Enforcement Act. This is hereby also clarified.

J. Y. Interpretation No.505（May 5, 2000）*

ISSUE: Does the directive of the Ministry of Finance violate the principle of legal reservation (*Rechtsvorbehaltprinzip*) embodied under Article 23 of the Constitution by demanding that a corporation complete its recapitalization registration filing prior to the operation of its newly acquired equipment or provided services, when the Enforcement Rules of the Act of Encouragement of Investment state that the corporation has to submit all pertinent documents to the Ministry of Finance for its review within one year from the day after its newly acquired equipment is put into operation or new services are provided?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）; Articles 3 and 6, Paragraph 2, of the Act of Encouragement of Investment（獎勵投資條例第三條、第六條第二項）; Article 11, Paragraph 1, Subparagraph 2, of the Enforcement Rules of the Act of Encouragement of Investment（獎勵投資條例施行細則第十一條第一項第二款）; Articles 129, Subparagraph 3, 266, 277, 278, 389 and 418 of the Company Act（公司法第一百二十九條第三款、第二百六十六條、第二百七十七條、第二百七十八條、第三百八十九條、第四百十八條）.

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* Translated by Joe Y.C.Wu.

** Contents within frame, not part of the original text, are added for reference purpose only.

KEYWORDS:

administrative interpretation（行政解釋）, principle of power reservation（法律保留原則）, legislative delegation（立法授權）, recapitalization registration（增資變更登記）.**

HOLDING: Revised and promulgated as of January 26, 1987, Article 6, Paragraph 2, of the Act of Encouragement of Investment (hereinafter the "Act", having expired on December 31, 1990) provides an option of incentive election to an enterprise that falls into any one of the categories and meets with all the criteria and standards set forth under Article 3 of the Act ("Article 3 Enterprise"). Once having raised more capital to acquire new equipment for production capacity or service scope expansion, an Article 3 Enterprise may elect one of the enumerated incentives afforded under Article 6, Paragraph 2, of the Act. The Act further delegates the Executive Yuan the power to issue enforcement rules for the administration of the incentive program. Article 11, Paragraph 1, Subpara graph 2, of the Enforcement Rules of the Act (hereinafter

解釋文：中華民國七十六年一月二十六日修正公布之獎勵投資條例（七十九年十二月三十一日因施行期間屆滿而當然廢止）第六條第二項規定，合於第三條獎勵項目及標準之生產事業，經增資擴展供生產或提供勞務之設備者，得就同條項所列獎勵擇一適用。同條例授權行政院訂定之施行細則第十一條第一項第二款復規定，增資擴展選定免徵營利事業所得稅四年者，應於其新增設備開始作業或開始提供勞務之次日起一年內，檢齊應附文件，向財政部申請核定之，此與公司辦理增資變更登記係屬兩事。財政部六十四年三月五日台財稅第三一六一三號函謂：生產事業依獎勵投資條例第六條第二項規定申請獎勵，應在擴展之新增設備開始作業或提供勞務以前，辦妥增資變更登記申請手續云云，核與前開施行細則之規定不合，係以職權發布解釋性行政規則對人民依法律享有之權利增加限制之要件，

the "Enforcement Rules") prescribes that an Article 3 Enterprise that elects a four-year income tax exemption must submit all pertaining documents for the review of the Ministry of Finance within one year from the day after newly acquired equipment is put into operation or new services are rendered. This filing requirement is distinct from a prerequisite filing to be done by a company for a capital increase. Failing to differentiate these two filing requirements, the Ministry of Finance, through a directive of March 5, 1975, Tai-Tsai-Shui No.31613, ordered that an Article 3 Enterprise, to be entitled to the election, shall complete its filing for recapitalization before its newly acquired equipment is put into operation or new services are rendered. This directive not only fails to comply with the Enforcement Rules, but also infringes upon the right to which the people are entitled under law through its power to issue interpretative administrative rules. As such, the directive as applied violates the principle of legal reservation *(Rechtsvorbehaltprinzip)* embodied under Article 23 of the Constitution, and shall no longer be applied.

與憲法第二十三條法律保留原則牴觸，應不予適用。

REASONING: In administering a particular set of laws, a governing administrative agency may issue directives within the scope of its delegated power for the purpose of necessary supplementary interpretation. Nevertheless, the directives issued can by no means conflict with the laws they are meant to interpret, a principle that has been espoused and elaborated many times in our previous Interpretations. As prescribed and afforded under Article 6, Paragraph 2, of the Act, an Article 3 Enterprise may elect one of the enumerated incentives, once having raised more capital to acquire new equipment for production capacity or service scope expansion. The Act further delegates the Executive Yuan to issue enforcement rules for the administration of the incentive program. As promulgated by the Executive Yuan pursuant to its delegated power, Article 11, Paragraph 1, Subparagraph 2, of the Enforcement Rules of the Act merely prescribes that an Article 3 Enterprise that elects a four-year income tax exemption must submit all pertaining documents for the review of the Ministry of Finance within one year from

解釋理由書：行政機關為執行法律，得依其職權發布命令，為必要之補充規定，惟不得與法律牴觸，迭經本院解釋有案。七十六年一月二十六日修正公布之獎勵投資條例第六條第二項規定，合於第三條獎勵項目及標準之生產事業，經增資擴展供生產或提供勞務之設備者，得就同條項所列獎勵擇一適用。同條例授權行政院訂定之施行細則第十一條第一項第二款復規定，增資擴展選定免徵營利事業所得稅四年者，應於其新增設備開始作業或開始提供勞務之次日起一年內，檢齊應附文件，向財政部申請核定之。依公司法第一百二十九條第三款規定，股份有限公司之股份總額及每股金額為章程必要記載事項，故公司依同法第二百七十八條規定增加資本者，應經股東會決議，變更章程，復為同法第二百七十七條第一項所明定。因增加資本而增加股份總數者，於股東會決議通過後，由董事會依公司法第二百六十六條以次之規定發行新股。以上增資之事項應由半數以上之董事及至少監察人一人依同法第四百十八條規定申請為變更登記；俟中央主管機關換發執照後，方為確定，同法第三百八十九條規定甚明。綜上以觀，股份有限公司增加資本經股東會決議通過後，發行

the day after newly acquired equipment is put into operation or new services are rendered. Under a different regulatory regime, as Article 129, Subparagraph 3, of the Company Act prescribes, a corporation must have the amount of its capitalization and the par value of its issued shares stipulated in its articles of incorporation. Article 277, Paragraph 1, of the Company Act further prescribes that once stipulated, any subsequent changes to raise the capital amount would require that a resolution be adopted at a shareholders' meeting to amend the bylaws. The capital increase and the amount of increase are further subject to Article 278 of the Company Act. Once the shareholders' meeting adopts a resolution to increase the capitalization amount, the directors must then issue new shares by following the procedures set forth under Articles 266, et seq., of the Company Act. In pursuance of Article 418 of the Company Act, at least half of the members of the board directors and at least one supervisor on behalf of the company must file an application for registration. The filing process, as explicitly stated under Article

新股，收取股款，即得由公司運用，其由公司用以新增設備開始作業或提供勞務並非法律所禁止，此與公司辦理增資變更登記係屬兩事，聲請人辦妥增資變更登記手續尚非該新增設備開始作業或提供勞務之前提要件。是財政部六十四年三月五日台財稅第三一六一三號函謂：生產事業依獎勵投資條例第六條第二項規定申請獎勵，應在擴展之新增設備開始作業或提供勞務以前，辦妥增資變更登記申請手續云云，核與前開施行細則之規定不合，係以職權發布解釋性行政規則對人民依法律享有之權利增加限制之要件，與憲法第二十三條法律保留原則牴觸，應不予適用。

389 of the Company Act, will not be complete until the central competent authorities issue a new certificate of incorporation. As stated above, a corporation after having obtained the requisite shareholders' approval may raise its capitalization amount by issuing new shares for subscription. After payments for the subscription are collected, the corporation may apply the new capital as it sees fit. The law does not dictate any particular use of the funds, be it for the purpose of new equipment acquisition or new services provision. A distinction must be made between the filing requirements for recapitalizaiton and for equipment acquisition or service provision. An applicant's completion of the process of registration is by no means a condition precedent to the incident of installing new equipment or providing new services. Thus, the directive of the Ministry of Finance, Tai-Tsai-Shui No. 31613, does more than conflict with the Enforcement Rules by demanding that a corporation complete its filing process of recapitalizaton before its newly acquired equipment is put into operation or new services are rendered so as

to be entitled to incentives granted under Article 6, Paragraph 2, of the Act. It also imposes new restrictions on the people's rights through its power to issue interpretative administrative rules. Accordingly, the directive violates the principle of legal reservation *(Rechtsvorbehaltprinzip)* espoused and embodied under Article 23 of the Constitution, and therefore, shall no longer be applied.

J. Y. Interpretation No.506（May 5, 2000）*

ISSUE: The Enforcement Rules of the Income Tax Act provide that the dividends of shares distributed to the shareholders shall be subject to income tax. Do the said provisions violate Article 19 of the Constitution, thus being null and void?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; Articles 12, 13 and 15 of the Act of Encouragement of Investment（獎勵投資條例第十二條、第十三條及第十五條）; Articles 3, 8, 24 and 76-1, Paragraph 1 of the Income Tax Act（所得稅法第三條、第八條、第二十四條、第七十六條之一第一項）; Article 70, Paragraph 1, of the Enforcement Rules of the Income Tax Act（所得稅法施行細則第七十條第一項）; Articles 16 and 17 of the current Act for Upgrading Industries（促進產業升級條例第十六條、第十七條）.

KETWORDS:

encouragement of investment（獎勵投資）, upgrading industries（產業升級）, income tax（所得稅）, re-investment（轉投資）, increase of capitalization (equity re-injection or re-capitalize)（增資）, paid-in capital（已收資本）.**

HOLDING: The object of the levy in the Income Tax Act concerning

解釋文：所得稅法關於營利事業所得稅之課徵客體，係採概括規定，

* Translated by Dr. Cheng-Hwa Kwang.

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income tax borne by a profit-seeking business is stipulated as a general provision. The revenue of a business entity deriving from business and other sources, unless exempted by law, shall be subject to taxation that, thus, coincides with the principle of tax equity. Article 70, Paragraph 1, of the Enforcement Rules of the Income Tax Act, as amended on March 26, 1981, provides: "When a corporation increases its capital by allotting undistributed earnings to shareholders, unless otherwise complying with Article 13 of the Act of Encouragement of Investment, the dividends of shares distributed to shareholders shall be subject to the levy of income tax upon distribution and the tax shall be withheld by the company upon distributing the dividends. The shareholders receiving the distribution shall include such dividends in their taxable income when they lodge their tax return of the corresponding year." This stipulation is not inconsistent with the goal and the purview of Article 76-1, Paragraph 1, and relevant provisions concerning the authorization in the Income Tax Act and hence constitutes no violation of the Con-

凡營利事業之營業收益及其他收益，除具有法定減免事由外，均應予以課稅，俾實現租稅公平負擔之原則。中華民國七十年三月二十六日修正發布之所得稅法施行細則第七十條第一項：「公司利用未分配盈餘增資時，其對股東所增發之股份金額，除應依獎勵投資條例第十三條之規定辦理者外，應由公司於配發時按盈餘分配扣繳稅款，並由受配股東計入增資年度各股東之所得額申報納稅」，尚未逾越六十六年元月三十日修正公布之所得稅法第七十六條之一第一項及同法相關規定授權之目的及範圍，與憲法並無違背。財政部六十四年二月二十日台財稅第三一二三五號函稱：公司當年度如有依獎勵投資條例第十二條（按即六十九年十二月三十日修正公布之獎勵投資條例第十三條，與現行促進產業升級條例第十六條及第十七條規範內容相當）及第十五條規定所取得之增資股票，及出售持有滿一年以上股票之收益，或其他法令得免予計入當年度所得課稅之所得，雖可依法免予計入當年度課稅所得，課徵營利事業所得稅；惟該項所得仍應計入該公司全年所得額內，計算未分配盈餘等語，係主管機關本於職權為執行有關稅法規定所為必要之釋示，符合上開法規之意旨，與促進

stitution. As elaborated in the Tai-Tsair-Shuey Ordinance No. 31235 issued by the Ministry of Finance, dated February 20, 1975, under Articles 12 (i.e., Article 13 of the Act of Encouragement of Investment as amended on December 30, 1980, and the corresponding provisions of Articles 16 and 17 of the current Act for Upgrading Industries.) and 15 of the Act of Encouragement of Investment, any share from the increase of capitalization acquired by a company and any profit derived from the sale of shares retained for more than one year or other incomes not regarded by relevant laws as taxable income for that taxation year may be exempted from the taxable income for the corresponding year and not be subject to the levy of business income tax. However, such incomes shall be included in the total income of the company and be calculated as undistributed earnings. This Ordinance by the tax collection authority, based on its jurisdiction and duty, is a necessary interpretation and coincides with the meaning of the said law in order to enforce the relevant taxation statutes. It is consistent with the regulating purpose of

產業升級條例之規範目的無違，於憲法第十九條之租稅法律主義亦無牴觸。

the Act for Upgrading Industries and the principle of taxation by law of Article 19 of the Constitution as well.

REASONING: In addition to executing the law that provides and regulates matters concerning the freedom and the rights of the people, the authority in charge may also be empowered by law to promulgate regulations or rulings specifically in dealing with such matters. In judging whether a regulation or ruling is consistent with the essence of the lawful authorization, the consideration shall not be confined to the wording of the law. Rather, an assessment shall be based on the legislative and overall purpose of the relevant law. With regard to the tax statutes, the tax collection authority in making necessary interpretations shall base its authority on the principle of taxation by law in connection with the legislative purpose of the law in question and shall consider the economic function of taxation as well as the principle of tax equity. This approach has been repeatedly elaborated in J.Y. Interpretations Nos. 420 and 438, respectively.

解釋理由書：關於人民自由權利之事項，除以法律規定外，法律亦得以具體明確之規定授權主管機關以命令為必要之規範。命令是否符合法律授權之意旨，則不應拘泥於法條所用之文字，而應以法律本身之立法目的及其整體規定之關聯意義為綜合判斷。又有關稅法之規定，主管機關得本於租稅法律主義之精神，依各該法律之立法目的，衡酌租稅經濟上之功能及實現課稅之公平原則，為必要之釋示，迭經本院釋字第四二〇號及第四三八號等解釋闡示在案。

The object of the levy in the Income Tax Act concerning income tax borne by a profit-seeking business is stipulated as a general provision. The income deriving from business and other sources, unless exempted by law, shall be subject to taxation. This rationale is demonstrated in Articles 3, 8 and 24 of the Income Tax Act. Article 76-1, Paragraph 1, of the Income Tax Act, as amended on January 30, 1977, prescribes the following method of taxation with respect to the increase of capitalization from undistributed earnings and to those retained as profits: "In the case of the retained profits of a profit-seeking enterprise organized in the form of a corporation having been accumulated to an amount equal to more than one-half of its paid-in capital, the profit-seeking enterprise shall, in the following business year, make the increase of capitalization by using its retained profits, but the total amount of its retained profits shall not exceed one-half of its paid-in capital after the increase of capitalization. Where a profit-seeking enterprise fails to make the increase of capitalization in accordance with this Act, the tax collection authority

所得稅法關於營利事業所得稅之課徵客體，係採概括規定，凡營利事業之營業收益及其他收益，除具有法定減免事由外，均應予以課稅，此觀所得稅法第三條、第八條及第二十四條之規定甚明。營利事業未分配盈餘之增資及未辦理增資時如何課稅，六十六年元月三十日修正公布之所得稅法第七十六條之一第一項有明文規定：「公司組織之營利事業，其未分配盈餘累積數超過已收資本額二分之一以上者，應於次一營業年度內，利用未分配盈餘，辦理增資，增資後未分配盈餘保留數，以不超過本次增資後已收資本額二分之一為限；其未依規定辦理增資者，稽徵機關應以其全部累積未分配之盈餘，按每股份之應分配數歸戶，並依實際歸戶年度稅率，課徵所得稅。」七十年三月二十六日修正發布之所得稅法施行細則第七十條第一項：「公司利用未分配盈餘增資時，其對股東所增發之股份金額，除應依獎勵投資條例第十三條之規定辦理者外，應由公司於配發時按盈餘分配扣繳稅款，並由受配股東計入增資年度各股東之所得額申報納稅」，並未逾越上開條文暨同法相關規定授權之目的及範圍。財政部六十四年二月二十日台財稅第三一二三五號函稱：公司當年度如有依獎

shall, in accordance with the total amount of retained profits, make a calculation of distributable profits for its shareholders and based upon the tax rates applicable in the taxable year, levy the income tax on the distributed profits per share." Article 70, Paragraph 1, of the Enforcement Rules of the Income Tax Act, as amended on March 26, 1981, provides: "When a corporation increases its capital by allotting undistributed earnings to shareholders, unless otherwise complying with Article 13 of the Act of Encouragement of Investment, the dividends of shares distributed to shareholders shall be subject to the levy of income tax upon distribution and the tax shall be withheld by the company upon distributing the dividends. The shareholders receiving the distribution shall include such dividends in their taxable income when they lodge their tax return of the corresponding year." This stipulation is not inconsistent with the goal and the purview of the above and relevant provisions concerning the authorization in the same Income Tax Act. The Tai-Tsair-Shuey Ordinance No. 31235 issued by the Ministry of Finance,

勵投資條例第十二條（按即六十九年十二月三十日修正公布之獎勵投資條例第十三條，與現行促進產業升級條例第十六條、第十七條規範內容相當）及第十五條規定所取得之增資股票，及出售持有滿一年以上股票之收益，或其他法令得免予計入當年度課稅之所得，雖可依法免予計入當年度課稅所得，課徵營利事業所得稅；惟該項所得仍應計入該公司全年所得額內，計算未分配盈餘等語，僅在闡釋公司轉投資所取得之增資股票依法免計入公司當年度營利事業所得稅額課稅，但仍應計入公司全年所得，以免有營業收益或其他收益，而排除於課稅客體之外，並未逾越所得稅法第七十六條之一第一項規定之範圍，係主管機關本於職權為執行有關稅法規定所為必要之釋示，與促進產業升級條例獎勵公司投資之立法意旨無違。

dated February 20, 1975, also provides the following: Pursuant to Articles 12 (i.e., Article 13 of the Act of Encouragement of Investment as amended on December 30, 1980, and the corresponding provisions of Articles 16 and 17 of the current Act for Upgrading Industries.) and 15 of the Act of Encouragement of Investment, any share from the increase of capitalization acquired by a corporation and any profit derived from the sale of shares retained for more than one year or other incomes not regarded by relevant laws as taxable income for that taxation year may be exempted from the taxable income for the corresponding year and not subject to the levy of business income tax. However, such incomes shall still be included in the total income of the corporation and be calculated as undistributed earnings. This ruling was merely intended to elaborate that any share from the increase of capitalization acquired through reinvestments by a corporation may be exempted from the levy of business income tax of the corresponding year. Nevertheless, such acquired shares shall be included in the total income of the corporation in order to en-

sure that no business income or other revenue is excluded from the object of taxation. This ruling is therefore within the purview of Article 76-1, Paragraph 1, of the Income Tax Act and is a necessary interpretation by the tax collection authority based on its jurisdiction and duty in enforcing relevant tax regulations, thus coinciding with the legislative purpose of the Act for Upgrading Industries which encourages investment from incorporated business entities.

To summarize, the said Article 70, Paragraph 1, of the Enforcement Rules of the Income Tax Act and the Tai-Tsair-Shuey Ordinance No. 31235 issued by the Ministry of Finance, dated February 20, 1975, constitute no violation of Article 19 of the Constitution.

綜上所述，前開所得稅法施行細則第七十條第一項規定及財政部六十四年二月二十日台財稅第三一二三五號函釋，於憲法第十九條均無牴觸。

J. Y. Interpretation No.507（May 19, 2000）*

ISSUE: Does the Patent Act which provides that a patentee may not institute a complaint based upon the infringements specified in the said Act unless he/she submits along with the complaint an infringement analysis report and gives to the infringer a written notice demanding discontinuance of such infringements violate the constitutional protection of the people's right of instituting legal proceedings?

RELEVANT LAWS:

Articles 16 and 23 of the Constitution（憲法第十六條、第二十三條）; Articles 123, 124, 125, 126 and 131, Paragraphs 2-4 of the Patent Act（專利法第一百二十三條、第一百二十四條、第一百二十五條、第一百二十六條、第一百三十一條第二項至第四項）.

KEYWORDS:

right of instituting legal proceedings（訴訟權）, principle of proportionality（比例原則）, infringement analysis report（侵害鑑定報告）, professional infringement analysis agencies（侵害鑑定專業機構）, patentee（專利權人）, infringer（加害人）.**

HOLDING: Article 16 of the Constitution provides people with the

解釋文：憲法第十六條規定人民有訴訟之權，此項權利之保障範圍包

* Translated by Chung Jen Cheng.

** Contents within frame, not part of the original text, are added for reference purpose only.

right of instituting legal proceedings. The scope of this guaranteed right includes the right of people to seek redress with courts when their rights are infringed upon. How to exercise their right, however, shall be stipulated in law. The law imposes reasonable restrictions on public and private prosecutions in order to prevent frivolous lawsuits which infringe upon the liberties of others and waste limited judicial resources. These restrictions must conform to the principle of proportionality set forth in Article 23 of the Constitution. Paragraphs 2-4 of Article 131 of the Patent Act as amended on January 21, 1994, provide: "In instituting a complaint against the offenses specified in Articles 123 through 126, a patentee shall submit along with his/her complaint an infringement analysis report and a written notice given by the patentee to the infringer requesting discontinuation of the infringement. In the absence of the documents set forth in the preceding Paragraph, the complaint filed shall be deemed not in accordance with the law. The Judicial and Executive Yuans shall coordinate with each other in appointing professional in-

括人民權益遭受不法侵害有權訴請司法機關予以救濟在內，惟訴訟權如何行使，應由法律予以規定。法律為防止濫行興訟致妨害他人自由，或為避免虛耗國家有限之司法資源，對於告訴或自訴自得為合理之限制，惟此種限制仍應符合憲法第二十三條之比例原則。中華民國八十三年一月二十一日修正公布之專利法第一百三十一條第二項至第四項規定：「專利權人就第一百二十三條至第一百二十六條提出告訴，應檢附侵害鑑定報告與侵害人經專利權人請求排除侵害之書面通知。未提出前項文件者，其告訴不合法。司法院與行政院應協調指定侵害鑑定專業機構。」依此規定被害人必須檢附侵害鑑定報告，始得提出告訴，係對人民訴訟權所為不必要之限制，違反前述比例原則。是上開專利法第一百三十一條第二項應檢附侵害鑑定報告及同條第三項未提出前項侵害鑑定報告者，其告訴不合法之規定，應自本解釋公布之日起不予適用。

fringement analysis agencies." According to these provisions, the injured party must submit an infringement analysis report in order to file a complaint. This is an unnecessary restriction on the right of instituting legal proceedings and violates the abovementioned principle of proportionality. From the date of this Interpretation, the provisions of Paragraphs 2 and 3 of Article 131 of the Patent Act shall no longer be applicable, which require that an infringement analysis report be submitted and that complaints be deemed not in accordance with the law if infringement analysis reports are not submitted.

REASONING: Article 16 of the Constitution provides people with the right of instituting legal proceedings. The scope of this guaranteed right includes the right of people to seek judicial relief with the criminal and administrative courts. Therefore, when people's rights are infringed upon, the infringing party shall be accountable for the criminal liabilities, and the injured party has the right to request the judicial sector to investigate, indict, and render judgments. The State

解釋理由書：憲法第十六條規定人民有訴訟之權，此項權利自亦包括人民尋求刑事司法救濟在內，是故人民因權利遭受非法侵害，加害之行為人因而應負刑事責任者，被害人有請求司法機關予以偵查、追訴、審判之權利，此項權利之行使國家亦應提供制度性之保障。其基於防止濫訴並避免虛耗國家有限之司法資源，法律對於訴訟權之行使固得予以限制，惟限制之條件仍應符合憲法第二十三條之比例原則。中華民國八十三年一月二十一日修正公布之專利

shall also provide a system to guarantee the exercise of such a right. The law imposes reasonable restrictions on public and private prosecutions in order to prevent frivolous lawsuits which infringe upon the liberties of others and waste limited judicial resources. These restrictions must conform to the principle of proportionality set forth in Article 23 of the Constitution. Paragraphs 2-4 of Article 131 of the Patent Act as amended on January 21, 1994, provide: "In instituting a complaint against the offenses specified in Articles 123 through 126, the patentee shall submit along with his complaint the infringement analysis report and the written notice given by the patentee to the infringer requesting discontinuation of the infringement. In the absence of the documents set forth in the preceding Paragraph, the complaint filed shall be deemed not in accordance with the law. The Judicial and the Executive Yuans shall coordinate with each other in appointing professional infringement analysis agencies." Assessment is one of many ways of determining evidence, according to the Code of Criminal Procedure. Based on the provisions

法第一百三十一條第二項至第四項規定：「專利權人就第一百二十三條至第一百二十六條提出告訴，應檢附侵害鑑定報告與侵害人經專利權人請求排除侵害之書面通知。未提出前項文件者，其告訴不合法。司法院與行政院應協調指定侵害鑑定專業機構。」查訴訟法上之鑑定為證據方法之一種，而依刑事訴訟法之規定，程序開始進行後，方有鑑定之適用，鑑定人之選任偵查中屬於檢察官，審判中則為法院之職權，縱經被害人提出所謂侵害鑑定報告，檢察官或法院仍應依法調查證據，非可僅憑上開鑑定報告逕行認定犯罪行為。專利法前述規定以檢附侵害鑑定報告為行使告訴權之條件，係對人民訴訟權所為不必要之限制，違反憲法第二十三條之比例原則。況鑑定專業機構若不願意接受被害人請求鑑定、作業遲延或因專利內容日新月異非其所能勝任等原因，將導致專利權人不能於行使告訴權之法定期間內，提起告訴。是主張遭受侵害之專利權人已以訴狀具體指明其專利權遭受侵害之事證者，其告訴即屬合法。綜上所述，上開專利法第一百三十一條第二項應檢附侵害鑑定報告及同條第三項未提出前項侵害鑑定報告者，其告訴不合法之規定，應自本解釋公布之日起不予適

prescribed in the said Code, the analysis shall be applicable upon commencement of the suit proceedings. The appointment of the infringement analysis agency shall be exercised by the public prosecutors during investigation and by the courts during court proceedings. Even if the injured party submits the so-called infringement analysis report, the public prosecutors shall still investigate evidence according to the laws, but not determine the criminal charges solely based on such an analysis report. According to these provisions, the injured party must submit an infringement analysis report in order to file a complaint. This is an unnecessary restriction on the right of instituting legal proceedings and violates the abovementioned principle of proportionality in Article 23 of the Constitution. Besides, the professional infringement analysis agencies' refusal to accept the injured party's request to conduct analysis, procedural delays attributed to the professional infringement analysis agencies, or the agencies' inability to conduct analysis due to the advanced technical issues in the patent disclosures, may also prevent the injured party from

用。

exercising his/her right of instituting legal proceedings within the statutory time limit. Hence, in instituting a complaint, as long as the patentee submits along with his/her complaint the facts and evidence clearly indicating the infringement of his/her patent rights, the complaint filed shall be deemed in accordance with the law. In summary, from the date of this Interpretation, the provisions of Paragraphs 2 and 3 of Article 131 of the Patent Act shall no longer be applicable, which require that an infringement analysis report be submitted and that complaints be deemed not in accordance with the law if infringement analysis reports are not submitted.

Justice Chi-Nan Chen filed dissenting opinion in part.

本號解釋陳大法官計男提出部分不同意見書。

J. Y. Interpretation No.508（June 9, 2000）*

ISSUE: The Ministry of Finance in its directive requires that in case a farm lease is terminated because of government expropriation, 50 percent of the compensation the tenant farmer receives from the landlord shall be subject to income tax. Does the said directive violate the constitutional principles of taxation by law, legal reservation, equality in fair taxation and the people's property right, thus being null and void?

RELEVANT LAWS:

Articles 7, 15, 19 and 23 of the Constitution（憲法第七條、第十五條、第十九條及第二十三條）; Articles 2, Paragraph 1, and 4, 8, 14, 110 of the Income Tax Act（所得稅法第二條第一項、第四條、第八條、第十四條及第一百十條）; Articles 10, 11, Paragraph 1, and 76, 77 of the Equalization of Land Rights Act（平均地權條例第十條、第十一條第一項、第七十六條及第七十七條）; Article 6, Paragraph 3 of the Act Governing the Development of New Urban Centers（新市鎮開發條例第六條第三項）; J. Y. Interpretation No. 275（司法院釋字第二七五號解釋）.

KEYWORDS:

consolidated income tax（綜合所得稅）, leased farm land（出租耕地）, compensation（補償費）, tenant farmer（佃

* Translated by Wei-Feng Huang of THY Taiwan International Law Offices.

** Contents within frame, not part of the original text, are added for reference purpose only.

農）, expropriation（徵收）, crops（地上物）, other income（其他所得）, tax exempt（免稅）, principle of taxation per legislation（租稅法律主義）, principle of equality of fair taxation（租稅公平主義）, principle of legal reservation（法律保留原則）.**

HOLDING: Article 2, Paragraph 1, of the Income Tax Act amended and promulgated on February 5, 1993, provides: "For any individual having income from sources in the Republic of China, consolidated income tax shall be levied on income derived from sources in the Republic of China in accordance with this Act." If leased farm land is expropriated pursuant to the law, then compensation payable to the lessee under Article 11, Paragraph 1, of the Equalization of Land Rights Act, amended and promulgated on October 30, 1989, is determined to be income as referred to in Article 8, Paragraph 11, of the Income Tax Act, and shall be treated as "other income" under Article 14, Paragraph 1, Category 9, of the said Act and thus shall be included in vidual's gross consolidated income. The Ministry

解釋文：中華民國八十二年二月五日修正公布之所得稅法第二條第一項規定：「凡有中華民國來源所得之個人，應就其中華民國來源之所得，依本法規定，課徵綜合所得稅。」依法徵收之土地為出租耕地時，依七十八年十月三十日修正公布之平均地權條例第十一條第一項規定應給與承租人之補償費，核屬所得稅法第八條第十一款規定之所得，應依同法第十四條第一項第九類所稱之其他所得，計算個人之綜合所得總額。財政部七十四年四月二十三日台財稅第一四八九四號函謂：「佃農承租之土地，因政府徵收而終止租約，其依平均地權條例第十一條規定，由土地所有權人所得之補償地價扣除土地增值稅後餘額之三分之一給予佃農之補償費，應比照地主收回土地適用所得稅法第十四條第三項變動所得之規定，以補償費之半數作為當年度所得，其餘半數免稅。」

of Finance Ordinance No.14894 of April 23, 1985, specifies that: "Where a lease taken by a tenant farmer is terminated due to expropriation by the government, then compensation awarded to the farmer under Article 11 of the Equalization of Land Rights Act ─ which is one third of the net compensation for land value, received by the land owner, after the land value tax ─ is analogous to variable income, being compensation for returning the leased farm land, under Article 14, Paragraph 3, of the Income Tax Act. As a consequence, only one half of the compensation is treated as taxable income while the other half is tax exempt." The bases for the foregoing Ordinance are the principle of fair tax and the objective to reduce tax liability for lessees of farm land. The Ordinance complies with the abovementioned provisions of the Income Tax Act and does not breach Articles 15, 19 and 23 of the Constitution. The said Ordinance No.14894 is an explanation of how compensations received by farm land lessees from lessors upon government expropriation of leased farm land are included in the calculation of annual

係基於課稅公平原則及減輕耕地承租人稅負而為之函釋，符合所得稅法上開各規定之意旨，與憲法第十五條、第十九條、第二十三條規定並無牴觸。前述第一四八九四號函釋，係對耕地承租人因政府徵收出租耕地自出租人取得之補償，如何計算當年度所得，作成之釋示；而該部六十六年七月十五日台財稅第三四六一六號函：「個人出售土地，除土地價款外，另自買受人取得之建物以外之地上物之補償費，免課所得稅。該項補償費如係由耕作地上物之佃農取得者，亦可免納所得稅。」係就土地買賣時，佃農取得之耕作地上物補償費免納所得稅所為之詮釋，前者係其他收益所得，後者為損失補償，二者之性質互異，自難相提並論，與憲法第七條平等原則並無違背。

income. The Ministry of Finance Ordinance No.34616 of July 15, 1977, states: "In cases of private land sales, compensation for crops growing on the land, excluding that paid for the land and the building, received from purchasers are exempt from income tax. If the said compensation is received by the tenant farmer who cultivated the crops, it is also exempt from income tax." This means that in any conveyance, if compensation is received by a tenant farmer for cultivating crops, it is exempt from income tax. Reference to compensation in Ordinance No.14894 is "other income" while that in Ordinance No. 34616 is "compensation for loss." They are different in nature and are thus incompatible, and do not breach the principle of equality stipulated in Article 7 of the Constitution.

REASONING: Article 11, Paragraph 1, of the Equalization of Land Rights Act stipulates: "If the land that is expropriated pursuant to the law or is acquired is a leased farm land, the lessee shall receive compensation from the land owner, in the amount of one third of the

解釋理由書：平均地權條例第十一條第一項規定：「依法徵收或照價收買之土地為出租耕地時，除由政府補償承租人為改良土地所支付之費用，及尚未收穫之農作改良物外，並應由土地所有權人，以所得之補償地價，扣除土地增值稅後餘額之三分之一，補償耕地

net compensation for the land value received after the land value tax, besides compensation from the government for costs of land improvement and crops not yet harvested." The said compensation for the land expropriated or acquired is granted to tenant farmers upon termination of their farm land lease by operation of law. Its nature is analogous to the compensation granted to lessees under Article 77 of the Equalization of Land Rights Act ─ being a source of income under Article 8, Paragraph 11, of the Income Tax Act amended and promulgated on February 5, 1993, (See Article 4 of the said Act and Article 6, Paragraph 3, of the Act Governing the Development of New Urban Centers). The said compensation shall be treated as "other income" as referred to in Article 14, Paragraph 1, Category 9, of the Income Tax Act, and the net amount ─ being the amount received as compensation less costs and necessary expenses ─ shall be included in the lessee's gross consolidated income and taxed under Article 2, Paragraph 1, of the said Act.

承租人。」此項土地補償費乃佃農因法定事由致其耕地租賃權消滅而獲得，性質上與承租人依平均地權條例第七十七條規定所獲得之補償費相同，屬八十二年二月五日修正公布之所得稅法第八條第十一款規定之中華民國所得來源，既不在依法得免稅之列（同法第四條及新市鎮開發條例第六條第三項參照），應依所得稅法第十四條第一項第九類規定之其他所得，以其收入額減除成本及必要費用後之餘額為所得額，全數併計入耕地承租人綜合所得總額，依同法第二條第一項規定課徵所得稅。

In the event a lessor of the farm land

耕地出租人依平均地權條例第七

terminates the lease and repossesses the land pursuant to Article 76 of the Equalization of Land Rights Act, then under Article 77 of the same Act, the lessor must compensate the farm land lessee in the amount of one third of the net government assessed land value, as of the date of the lessor's application for termination, after the estimated land value tax. Under Article 14, Paragraph 3, of the Income Tax Act, only half of the said compensation is included in the individual's annual income while the other half is exempt from tax. The reason for such treatment is because the compensation to the lessee is income accrued over several years and has the nature of long accrual, and consolidated income tax is taxed at a progressive tax rate so that if one calculates a farm land lessee's gross consolidated income as "other income" in accordance with the said provision in Article 14, Paragraph 1, Category 9, of the said Act, and taxes the whole of the compensation in one financial year, it will increase the farm land lessee's tax liability. With regard to leased farm land expropriated by the government, the lessor of the farm land shall, in

十六條規定終止租約收回耕地，依同條例第七十七條規定，由耕地出租人就申請終止租約當期之公告土地現值，減除預計土地增值稅後餘額之三分之一，給與耕地承租人補償費。此項補償費依所得稅法第十四條第三項規定，得僅以半數作為當年度所得，其餘半數免稅。實因承租人之此項補償費，為其多年累積而發生之所得，具有長期累積性質，綜合所得稅又係採累進稅率，如逕依同法第十四條第一項第九類其他所得之前開規定，計算耕地承租人之綜合所得額，集中於同一年度課稅，勢必加重耕地承租人之稅負。而政府徵收出租之耕地，依平均地權條例第十一條規定，由耕地出租人以所得之補償地價，扣除土地增值稅後餘額之三分之一，給與耕地承租人之補償費，性質上與上述同條例第七十七條規定之補償費相若。財政部七十四年四月二十三日台財稅第一四八九四號函謂：「佃農承租之土地，因政府徵收而終止租約，其依平均地權條例第十一條規定，由土地所有權人所得之補償地價扣除土地增值稅後餘額之三分之一給予佃農之補償費，應比照地主收回土地適用所得稅法第十四條第三項變動所得之規定，以補償費之半數作為當年度所得，其餘半數免稅。」係基於公平原

accordance with Article 11 of the Equalization of Land Rights Act, pay compensation to the farm land lessee in the amount of one third of the net compensation for the expropriated land after the land value tax. Its nature is analogous to the compensation awarded under the abovementioned Article 77 of the same Act. The Ministry of Finance Ordinance No.14894 of April 23, 1985, states that: "Where a lease taken by a tenant farmer is terminated due to expropriation by the government, compensation awarded to the farmer under Article 11 of the Equalization of Land Rights Act─ which is one third of the net compensation for land value, received by the land owner, after the land value tax ─ is analogous to variable income, being compensation for returning the leased farm land, under Article 14, Paragraph 3, of the Income Tax Act. Thus, only one half of the compensation is treated as taxable income while the other half is tax exempt." The bases for the foregoing Ordinance are the principle of fair tax and the objective to reduce the tax liability for lessees of farm land. The Ordinance complies with the principle of fair tax, and is

則及減輕耕地承租人稅賦負擔而為之函釋，符合課稅公平原則之要求，與所得稅法第二條第一項、第八條第十一款、第十四條第一項第九類、第三項規定之意旨無違，與憲法第十五條保障人民財產權、第十九條租稅法律主義及第二十三條法律保留原則之規定，亦無牴觸。

not contradictory to Article 2, Paragraph 1, Article 8, Paragraph 11, and Article 14, Paragraph 1, Category 9, and Paragraph 3 of the Income Tax Act, nor does it breach the people's right to property, duty to pay tax and principle of legal reservation *(Rechtsvorbehaltprinzip)* stipulated in Articles 15, 19 and 23, respectively, of the Constitution.

The Ministry of Finance Ordinance No.14894 of April 23, 1985, is an explanation of how compensations received by farm land lessees from lessors upon government expropriation of leased farm land are included in the calculation of annual income. The Ministry of Finance Ordinance No.34616 of July 15, 1977, states: "In cases of private land sales, compensation for crops growing on the land, excluding those paid for the land and the building, received from purchasers are exempt from income tax. If the said compensation is received by the tenant farmer who cultivated the crops, it is also exempt from income tax." This means that in any conveyance, if compensation is received by a tenant farmer for cultivating crops, it

財政部七十四年四月二十三日台財稅第一四八九四號函，係對耕地承租人因政府徵收出租耕地自出租人取得之補償，如何計算當年度所得，作成之釋示；而該部六十六年七月十五日台財稅第三四六一六號函：「個人出售土地，除土地價款外，另自買受人取得之建物以外之地上物之補償費，免課所得稅。該項補償費如係由耕作地上物之佃農取得者，亦可免納所得稅。」係就土地買賣時，佃農取得之耕作地上物補償費免納所得稅所為之詮釋，前者係其他收益所得，後者為損失補償，二者之性質互異，自難相提並論，與憲法第七條平等原則並無違背。又依所得稅法第一百十條第一項規定處罰納稅義務人，固以納稅義務人就其應課稅所得額申報之漏報或短報情事，具有故意或過失為必要

is exempt from income tax. Reference to compensation in Ordinance No.14894 is "other income" while that in Ordinance No. 34616 is "compensation for loss." They are different in nature and are thus incompatible, and do not breach the principle of equality stipulated in Article 7 of the Constitution. Further, penalty to taxpayers for omission or underreporting of taxable income under Article 110 Paragraph 1 of the Income Tax Act can only be imposed where there is intent or negligence (See this Yuan's Interpretation No. 275). Whether there is intent or negligence is a question of fact.

（本院釋字第二七五號解釋參照），惟有無故意或過失，乃事實認定問題，併此敘明。

Justice Jyun-Hsiung Su filed dissenting opinion in part.

本號解釋蘇大法官俊雄提出部分不同意見書。

J. Y. Interpretation No.509（July 7, 2000）*

ISSUE: (1) Do Paragraphs 1 and 2 of Article 310 of the Criminal Code, which criminalize defamation, violate the principle of proportionality embodied under Article 23 of the Constitution?

(2) Does Paragraph 3 of Article 310 of the Criminal Code, which provides truth as an affirmative defense for a person accused of criminal defamation and requiring the accused to show truthfulness, violate the freedom of speech protected under Article 11 of the Constitution?

RELEVANT LAWS:

Articles 11 and 23 of the Constitution（憲法第十一條、第二十三條）; Articles 310 and 311 of the Criminal Code（刑法第三百十條、第三百十一條）.

KEYWORDS:

criminal defamation（誹謗罪）, libel（加重誹謗）, slander（一般誹謗）, affirmative defense（阻卻違法）, decriminalization of defamation（誹謗除罪化）, self-expression（表現自我）, self-realization（實現自我）, right of privacy（隱私權）, media（傳播）, ethics standards（道德標準）.**

HOLDING: The freedom of speech, a fundamental right guaranteed by

解釋文：言論自由為人民之基本權利，憲法第十一條有明文保障，國

* Translated by Joe Y.C. Wu.

** Contents within frame, not part of the original text, are added for reference purpose only.

Article 11 of the Constitution, requires that the government grant a maximum amount of protection for free speech. Only under the purview of the constitutional protection can we fully realize and express ourselves, pursue the truth, and take part in all manners of political and social activities. However, in light of protecting other fundamental rights such as personal reputation and privacy and public interests as well, the freedom of speech is not an absolute right but subject to reasonable statutory restraints imposed upon the communication media. Article 310, Paragraphs 1 and 2, of the Criminal Code criminalizes defamation in order to protect individual legal interests, a necessary countermeasure to prevent one's infringement of others' freedoms and rights. Such restraints do not violate Article 23 of the Constitution. Article 310, Paragraph 3, of the Criminal Code provides truth as an affirmative defense against a conviction of criminal defamation. This provided defense purports to protect truthful speeches and to demarcate the reach of the government's penal power. However, it is not a corollary that for a successful

家應給予最大限度之維護，俾其實現自我、溝通意見、追求真理及監督各種政治或社會活動之功能得以發揮。惟為兼顧對個人名譽、隱私及公共利益之保護，法律尚非不得對言論自由依其傳播方式為合理之限制。刑法第三百十條第一項及第二項誹謗罪即係保護個人法益而設，為防止妨礙他人之自由權利所必要，符合憲法第二十三條規定之意旨。至刑法同條第三項前段以對誹謗之事，能證明其為真實者不罰，係針對言論內容與事實相符者之保障，並藉以限定刑罰權之範圍，非謂指摘或傳述誹謗事項之行為人，必須自行證明其言論內容確屬真實，始能免於刑責。惟行為人雖不能證明言論內容為真實，但依其所提證據資料，認為行為人有相當理由確信其為真實者，即不能以誹謗罪之刑責相繩，亦不得以此項規定而免除檢察官或自訴人於訴訟程序中，依法應負行為人故意毀損他人名譽之舉證責任，或法院發現其為真實之義務。就此而言，刑法第三百十條第三項與憲法保障言論自由之旨趣並無牴觸。

assertion of the defense, an accused disseminator of a defamatory statement would have to carry the burden of proving its truthfulness. To the extent that the accused fails to demonstrate that the defamatory statement is true, as long as the accused has reasonable grounds to believe that the statement was true when disseminated and has proffered evidence to support the belief, the accused must be found not guilty of criminal defamation. This provision does nothing to exempt a public or private prosecutor from carrying his/her burden of proof to show that the accused has the requisite mens rea to damage another person's reputation, an evidential burden mandated under the criminal procedures, nor does it exempt the court from its obligation of discovering the truth. Accordingly, Article 310, Paragraph 3, of the Criminal Code does not violate the freedom of speech as it is protected under the Constitution.

REASONING: Article 11 of the Constitution guarantees the right to enjoy the freedom of speech. Such freedom is essential for the diversity of a democratic

解釋理由書：憲法第十一條規定，人民之言論自由應予保障，鑑於言論自由有實現自我、溝通意見、追求真理、滿足人民知的權利，形成公意，促

society. For the freedom of speech not only allows each individual to achieve self-fulfillment, utter his/her opinion freely, pursue the truth, and realize his/her right to know, but also to help the society form a consensus, and encourage civil participation in all manners of rational political and social activities. Thanks to its functions, the government must endeavor to grant a maximum amount of protection to the freedom of speech. However, in light of protecting other individual rights such as personal reputation and privacy and public interests as well, the government may impose reasonable restrictions upon the communication media. The restrictive mechanisms adopted could be civil remedies and/or punitive measures. To make a choice, all of the following factors must be considered: constituents' habit of abiding by the law, constituents' respectfulness for the rights of their peers, effectiveness and availability of the prevailing civil remedies, the media professionals' willingness to comply with their ethics standards in performing their duties, and the effectiveness of sanctions imposed by self-regulatory organizations.

進各種合理的政治及社會活動之功能，乃維持民主多元社會正常發展不可或缺之機制，國家應給予最大限度之保障。惟為保護個人名譽、隱私等法益及維護公共利益，國家對言論自由尚非不得依其傳播方式為適當限制。至於限制之手段究應採用民事賠償抑或兼採刑事處罰，則應就國民守法精神、對他人權利尊重之態度、現行民事賠償制度之功能、媒體工作者對本身職業規範遵守之程度及其違背時所受同業紀律制裁之效果等各項因素，綜合考量。以我國現況而言，基於上述各項因素，尚不能認為不實施誹謗除罪化，即屬違憲。況一旦妨害他人名譽均得以金錢賠償而了卻責任，豈非享有財富者即得任意誹謗他人名譽，自非憲法保障人民權利之本意。刑法第三百十條第一項：「意圖散布於眾，而指摘或傳述足以毀損他人名譽之事者，為誹謗罪，處一年以下有期徒刑、拘役或五百元以下罰金」，第二項：「散布文字、圖畫犯前項之罪者，處二年以下有期徒刑、拘役或一千元以下罰金」係分別對以言詞或文字、圖畫而誹謗他人者，科予不同之刑罰，為防止妨礙他人自由權益所必要，與憲法第二十三條所定之比例原則尚無違背。

Considering our citizenry and all of the above factors, the failure to decriminalize defamation hardly constitutes a violation of the freedom of speech protected under the Constitution. If the law allowed anyone to avoid penalty for defamation by offering monetary compensation, it would be tantamount to issuing them a license to defame, a choice obviously not in line with the constitutional protection of the people's fundamental rights. Article 310, Paragraph 1, of the Criminal Code provides that "any person who intends to disseminate defamatory statements to the public by originating or circulating them may be subject to imprisonment of one year or less, forced labor, or a fine of 500 dollars (yin-yen) or less." Paragraph 2 of the same Article further provides that "any person who commits the acts proscribed under Paragraph 1 in writing or pictures is subject to imprisonment of two years or less, forced labor, or a fine of 1,000 dollars (yin-yen) or less." The statutes distinguish between libel, whereby writing and pictures are applied for perpetration, and slander, whereby spoken words are used for the commission of

such acts. Since the distinction comes within the scope of Article 23 of the Constitution without violating the principle of proportionality, it is not unconstitutional and is in the interests of preventing interference with others' fundamental rights.

Article 310, the first sentence of Paragraph 3, of the Criminal Code provides that "to the extent that a statement is defamatory, an accused must be found not guilty if the accused is able to show that the statement is true." This provision prescribes the elements of a defense; that is, a perpetrator who originated or circulated a defamatory statement may be found not guilty of criminal defamation, if the statement is true. Nevertheless, it does not imply that the accused must carry the burden of proof that the defamatory statement is in fact a truthful statement. In the case where the accused has no way of showing the truthfulness of the statement, the court must find the accused not guilty when the evidence proffered for the court's review shows that the accused has reasonable grounds to believe that the statement was true at the moment of dissemination. Fur-

刑法第三百十條第三項前段規定：「對於所誹謗之事，能證明其為真實者，不罰」，係以指摘或傳述足以毀損他人名譽事項之行為人，其言論內容與事實相符者為不罰之條件，並非謂行為人必須自行證明其言論內容確屬真實，始能免於刑責。惟行為人雖不能證明言論內容為真實，但依其所提證據資料，認為行為人有相當理由確信其為真實者，即不能以誹謗罪之刑責相繩，亦不得以此項規定而免除檢察官或自訴人於訴訟程序中，依法應負行為人故意毀損他人名譽之舉證責任，或法院發現其為真實之義務。就此而言，刑法第三百十條第三項與憲法保障言論自由之旨趣並無牴觸。

thermore, this provision does not exempt a public or private prosecutor from his/her statutory burden to prove that the accused has intended to damage another person's reputation, a burden mandated by the criminal procedures, nor does the provision exempt the court from its duty of discovering the truth. Therefore, Article 310, Paragraph 3, of the Criminal Code does not conflict with the constitutional provision for the protection of the freedom of speech.

Article 311 of the Criminal Code provides that "statements made in good will on any of the following occasions are not punishable: (1) for the purposes of self-defense, exculpation, or protecting lawful interests; (2) reporting done by civil servants as mandated by their duties; (3) expressing appropriate opinions in connection with public interests or affairs meriting public discussion; or (4) recounting of minutes recorded by any central or local councils, courts or public gatherings." This provision specifies four statutory affirmative defenses to protect free speech made with good will on a particu-

刑法第三百十一條規定：「以善意發表言論，而有左列情形之一者，不罰：一、因自衛、自辯或保護合法之利益者。二、公務員因職務而報告者。三、對於可受公評之事，而為適當之評論者。四、對於中央及地方之會議或法院或公眾集會之記事，而為適當之載述者。」係法律就誹謗罪特設之阻卻違法事由，目的即在維護善意發表意見之自由，不生牴觸憲法問題。至各該事由是否相當乃認事用法問題，為審理相關案件法院之職責，不屬本件解釋範圍。

lar occasion. No issue of unconstitutionality has been raised. As to their appropriateness and applicability, it is the job of a presiding court on a case-by-base basis and beyond the scope of this Interpretation.

Justice Jyun-Hsiung Su filed concurring opinion.

Justice Geng Wu filed concurring opinion.

本號解釋蘇大法官俊雄、吳大法官庚分別提出協同意見書。

J. Y. Interpretation No.510（July 20, 2000）*

ISSUE: Does Article 25 of the Civil Aviation Act, which authorizes the competent authority to conduct periodic and special checks on the knowledge, technical skill, and physical fitness of flight personnel, constitute a restraint on the people's right of work as guaranteed by Article 15 of the Constitution?

RELEVANT LAWS:

Articles 15 and 23 of the Constitution（憲法第十五條、第二十三條）; Article 25 of the Civil Aviation Act（民用航空法第二十五條）; Articles 48, Paragraph 1, and 52, 53 of the Criteria for the Physical Examination of Flight Personnel（航空人員體格檢查標準第四十八條第一項、第五十二條、第五十三條）.

KEYWORDS:

civil aviation（民用航空）, medical fitness（體格合適性）, right of work（工作權）.**

HOLDING: Article 15 of the Constitution guarantees the people's right of work. People have the freedom to work and to choose jobs. Nevertheless, work, which bears a close relation to the public

解釋文：憲法第十五條規定人民之工作權應予保障，人民從事工作並有選擇職業之自由。惟其工作與公共利益密切相關者，於符合憲法第二十三條比例原則之限度內，對於從事工作之方

* Translated by Bernard Y. Kao.

** Contents within frame, not part of the original text, are added for reference purpose only.

interest, may be regulated by orders expressly authorized by law regarding ways, necessary qualifications or other conditions, with reference to the nature of the law and the limitations on the right of work, and within the limits of the principle of proportionality bestowed in Article 23 of the Constitution. Article 25 of the Civil Aviation Act, as amended on November 19, 1984, stipulates that flight personnel are subject to periodic and special checks by the Civil Aeronautics Administration (hereinafter referred to as the "CAA") on knowledge, technical skill and physical fitness. Any flight personnel found to fall below standards in such checks is liable to restriction, suspension or termination of his /her professional work. The CAA is authorized to prescribe the abovementioned standards for checks (Article 25 of the Act, as amended on January 27, 1995, and Article 26 of the Act, as amended on January 21, 1998, provide the same standards). Accordingly, Article 48, Paragraph 1, of the Criteria for the Physical Examination of Flight Personnel, as amended and promulgated on August 26, 1993, provides that any flight

式及必備之資格或其他要件，得以法律或視工作權限制之性質，以有法律明確授權之命令加以規範。中華民國七十三年十一月十九日修正公布之民用航空法第二十五條規定，民用航空局對於航空人員之技能、體格或性行，應為定期檢查，且得為臨時檢查，經檢查不合標準時，應限制、暫停或終止其執業，並授權民用航空局訂定檢查標準（八十四年一月二十七日修正公布之同法第二十五條及八十七年一月二十一日修正公布之第二十六條規定意旨亦同）。民用航空局據此授權於八十二年八月二十六日修正發布之「航空人員體格檢查標準」，其第四十八條第一項規定，航空人員之體格，不合該標準者，應予不及格，如經特別鑑定後，認其行使職務藉由工作經驗，不致影響飛航安全時，准予缺點免計；第五十二條規定：「為保障民航安全，對於准予體格缺點免計者，應予時間及作業之限制。前項缺點免計之限制，該航空人員不得執行有該缺點所不能執行之任務」，及第五十三條規定：「對缺點免計受檢者，至少每三年需重新評估乙次。航空體檢醫師或主管，認為情況有變化時，得隨時要求加以鑑定」，均係為維護公眾利益，基於航空人員之工作特性，就職業選擇自由個人

personnel who do not meet the standards shall be considered to have failed. Yet, if according to a special inspection, the CAA finds that the performance of duties of the flight personnel relies on his/her experience, and does not affect flight safety, the failure may be exempted. Article 52 further provides, "To ensure flight safety, those who are exempted shall be limited in their working hours and duties. According to the limitation in the preceding paragraph, the flight personnel shall not carry out those missions which cannot be accomplished with such limitations (based on the failure to pass the checks)." In addition, Article 53 states, "Those who are exempted must be re-evaluated in at least three years. Aviation health examination doctors or superiors may request a checkup should they think circumstances have changed." All the above provisions are to ensure the public interest, and are based on the special working conditions of flight personnel. The restrictions are qualifications on the freedom to choose jobs, and they are not punitive measures. As such, they comply with the Interpretation aforementioned, and do not violate

應具備條件所為之限制，非涉裁罰性之處分，與首開解釋意旨相符，於憲法保障人民工作權之規定亦無牴觸。

the people's right of work guaranteed by the Constitution.

REASONING: Article 15 of the Constitution guarantees the people's right of work. People have the freedom to work and to choose jobs. Nevertheless, work, which bears a close relation to the public interest, may be regulated by law within the limits of the principle of proportionality *(Verhältnismäßigkeitsprinzip)* bestowed in Article 23 of the Constitution. Moreover, it is impossible for a law to regulate every detail, and as far as the right to choose jobs is concerned, the law, by taking into account the nature of relevant professional activities, may authorize the competent authority, by means of administrative orders, to establish appropriate standards regarding the requirements such as knowledge, capability, age, and physical fitness for those engaged in a specified profession.

解釋理由書：憲法第十五條規定人民之工作權應予保障，人民從事工作並有選擇職業之自由。惟其工作與公共利益密切相關者，於符合憲法第二十三條比例原則之限度內，對於從事工作之方式及必備之資格或其他要件，得以法律加以限制。然法律規定不能鉅細靡遺，就選擇職業之自由，尚非不得衡酌相關職業活動之性質，對於從事特定職業之個人應具備之知識、能力、年齡及體能等資格要件，授權有關機關以命令訂定適當之標準。

Modern aircraft have become an important means of transportation. The structure of aircraft is sophisticated, the operation of which involves a significant

近代航空運輸，已屬人類重要交通工具，航空器之結構精密，其操作具有高度專業性，加以航空器在高空快速飛行，其安全與否，於公共利益有密切

degree of professional skills. In addition, the aircraft travels at high speed; thus, its safety bears a close relation to the public interest. Therefore, those who engage in air transport must receive substantial professional training, and their physical and mental health, as well as physical fitness, are also necessary requirements for the profession. Thus, Article 25 of the Civil Aviation Act, as amended on November 11, 1984, provides that, "(F)light personnel shall be subject to periodic and special checks by the CAA on knowledge, technical skill and physical fitness. Any flight personnel found to fall below the standards in such checks is liable to restriction, suspension or termination of his/her professional work." The CAA is authorized by the same Act to prescribe the standards for checks (Article 25 of the Act, as amended on January 27, 1995, and Article 26 of the Act, as amended on January 21, 1998, provide the same standards). Accordingly, Article 48, Paragraph 1, of the Criteria for the Physical Examination of Flight Personnel, as amended and promulgated on August 26, 1993, provides that flight personnel who

關係，因而從事飛航之人員，不僅須受高度之專業訓練，而其身心健全，並具有相當之體能，尤為從事此項職業之必要條件。七十三年十一月十九日修正公布之民用航空法第二十五條乃規定，民用航空局對於航空人員之技能、體格或性行，應為定期檢查，且得為臨時檢查，經檢查不合標準時，應限制、暫停或終止其執業，並授權民用航空局訂定檢查標準（八十四年一月二十七日修正公布之同法第二十五條及八十七年一月二十一日修正公布之第二十六條規定意旨亦同）。民用航空局依據授權於八十二年八月二十六日修正發布之「航空人員體格檢查標準」，其第四十八條第一項規定，航空人員之體格，不合該標準者，應予不及格，如經特別鑑定後，認其行使職務藉由工作經驗，不致影響飛航安全時，准予缺點免計；第五十二條規定：「為保障民航安全，對於准予體格缺點免計者，應予時間及作業之限制。前項缺點免計之限制，該航空人員不得執行有該缺點所不能執行之任務」，及第五十三條規定：「對缺點免計受檢者，至少每三年需重新評估乙次。航空體檢醫師或主管，認為情況有變化時，得隨時要求加以鑑定」（八十九年二月二日修正發布之航空人員體格

do not meet the standards shall be considered to have failed. Yet, if according to a special checkup, the CAA finds that the flight personnel's performance of duties is dependent upon his/her experience, and does not affect flight safety, the failure may be exempted. Article 52 further provides, "(T)o ensure flight safety, flight personnel who are exempted shall be restricted in his/her working hours and duties. According to the restrictions in the preceding paragraph, the flight personnel shall not carry out those missions which cannot be accomplished with such failure." In addition, Article 53 states, " (T)hose who are exempted shall be re-evaluated in at least three years. Aviation health examination doctors or superiors may request special checkups should they think circumstances have changed." (Articles 49, 52, and 53 of the Criteria for the Physical Examination of Flight Personnel, amended on February 17, 2000, provide similar stipulations.) All the above provisions are based on the special working conditions of airmen. They are necessary physical fitness requirements for the performance of duties of flight personnel,

檢查標準，相關規定第四十九條、第五十二條、第五十三條規定意旨相仿），均係基於航空人員之工作特性，針對其執行業務時所應維持體能狀態之必要而設計，係就從事特定職業之人應具備要件所為之規範，非涉裁罰性之處分，與首開解釋意旨相符，於憲法保障人民工作權之規定，亦無牴觸。

and are regulations regarding the qualifications for those engaged in a specified profession. They are not punitive measures, and as such they comply with the Interpretation aforementioned, and do not violate the people's right of work guaranteed by the Constitution.

J. Y, Interpretation No.511（July 27, 2000）*

ISSUE: Do the Uniform Punishment Standard Forms and Rules for Handling the Matters of Violating Road Traffic Regulations, which stipulate that traffic regulation violators upon being duly notified but failing to pay the minimum fine within 15 days shall be fined the maximum amount, violate the constitutional principle of legal reservation, thus being null and void?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）; Articles 9, Paragraph 1, and 92 of the Act Governing the Punishment for Violation of Road Traffic Regulations（道路交通管理處罰條例第九條第一項、第九十二條）; Articles 41, Paragraphs 1 and 2, 44, Paragraph 1, and 48, Paragraph 1 of the Uniform Punishment Standard Forms and Rules for Handling the Matters of Violating Road Traffic Regulations（違反道路交通管理事件統一裁罰標準及處理細則第四十一條第一項、第二項、第四十四條第一項、第四十八條第一項）; Uniform Punishment Standard of Forms for Violating Road Traffic Regulations（違反道路交通管理事件統一裁罰標準表）; J. Y. Interpretation No. 423（司法院釋字第四二三號解釋）; Air Pollution Control Act（空氣污染防制法）; Imposition of Fine Standards for Air Pollution Exhausted by Motor Vehicles（交通工具排放空氣污染物罰鍰標準）.

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* Translated by Raymond T. Chu.

** Contents within frame, not part of the original text, are added for reference purpose only.

KEYWORDS:

road traffic regulation（道路交通管理）, minimum amount of fine（罰鍰最低額）, voluntary payment（自動繳納）, principle of reservation of law（法律保留原則）, enabled by law（法律授權）, enabling statue（母法）, discretion（裁量）.**

HOLDING: To strengthen road traffic regulations, maintain the orderly flow of traffic, and ensure safety in road transport, the Act Governing the Punishment for Violation of Road Traffic Regulations sets out various classes of administrative penalties for acts in violation of the Act. The Act provides in Article 9, Paragraph 1, that a person violating traffic rules punishable by a fine may, within fifteen days after receiving a notification of violation of traffic regulations, voluntarily pay the minimum fine specified in the Act so as to close the case. Article 41, Paragraph 1, and Article 48, Paragraph 1, of the Uniform Punishment Standard Forms and Rules for Handling the Matters of Violating Road Traffic Regulations enabled by Article 92 of the Act are merely

解釋文：為加強道路交通管理，維護交通秩序，確保道路交通安全，道路交通管理處罰條例對違反該條例之行為定有各項行政罰。同條例第九條第一項規定應受罰鍰處罰之行為人接獲違反道路交通管理事件通知單後，得於十五日內逕依各該條款罰鍰最低額，自動繳納結案。依同條例第九十二條授權訂定之違反道路交通管理事件統一裁罰標準及處理細則第四十一條第一項及第四十八條第一項僅係就上開意旨為具體細節之規定，並未逾越母法之授權，與法律保留原則亦無違背，就此部分與本院釋字第四二三號解釋所涉聲請事件尚屬有間。至上開細則第四十一條第二項規定，行為人逾指定應到案日期後到案，另同細則第四十四條第一項規定，違反道路交通管理事件行為人未依規定自動繳納罰鍰，或未依規定到案聽候裁

provisions dealing with specific details for the abovementioned purposes, and have not therefore gone beyond the scope of power conferred by the enabling Act, nor are they inconsistent with the principle of legal reservation. In this respect, the case before this Yuan is distinguishable from Interpretation No. 423 in the nature of the issues involved. As regards the imposition of fines by regulatory agencies in sums specified in the attached Uniform Punishment Standards under Article 41, Paragraph 2, of said Rules where the person acting in violation of traffic rules appears before the agency after the lapse of the date specified or under Article 44, Paragraph 1, of said Rules where the traffic violator fails to pay voluntarily the fine imposed on him/her or fails to appear before the agency as ordered to hear the decision, our opinion is that the Uniform Punishment Standards provides a standard of penalty enacted by the competent authority within its power of discretion authorized by law and that the amounts of the fines specified therein are found to be within the limit expressly prescribed by law. Furthermore, it embodies the func-

決者，處罰機關即一律依標準表規定之金額處以罰鍰，此屬法律授權主管機關就裁罰事宜所訂定之裁量基準，其罰鍰之額度並未逾越法律明定得裁罰之上限，且寓有避免各行政機關於相同事件恣意為不同裁罰之功能，亦非法所不許。上開細則，於憲法保障人民財產權之意旨並無牴觸。至行為人對主管機關之裁罰不服，法院就其聲明異議案件，如認原裁決有違法或不當之情事，縱行為人有未依指定到案日期到案或委託他人到案者，仍得為變更處罰之裁判，乃屬當然。

tion as a means to avoid possible variance in punishment to be arbitrarily imposed by different administrative agencies for similar incidents of violation. Such rules are thus not against the spirit of the Constitution in protecting the people's property right. It follows without doubt that if the court, in a case where the party files an objection to the penalty decided by the regulatory agency, finds the decision to be improper or against the law, may deliver an adjudication to reverse the decision even though the traffic violator might have failed to appear on the specified date or to have delegated another person to appear for and on behalf of him/her.

REASONING: To strengthen road traffic regulations, maintain the orderly flow of traffic, and ensure safety in road transport, the Act Governing the Punishment for Violation of Road Traffic Regulations sets out various classes of administrative penalty for acts in violation of the Act. The Act provides in Article 9, Paragraph 1, that "in the case of a penalty by fine, the violator shall be present at the designated agency to hear the decision

解釋理由書：為加強道路交通管理，維護交通秩序，確保道路交通安全，道路交通管理處罰條例對違反該條例之行為定有各項行政罰。同條例第九條第一項規定：「本條例所定罰鍰之處罰，行為人接獲違反道路交通管理事件通知單後，應於十五日內，到達指定處所聽候裁決。但行為人認為舉發之事實與違規情形相符者，得不經裁決，逕依各該條款罰鍰最低額，自動向指定之處所繳納結案。」依同條例第九十二條授

with fifteen days after receiving a notification of violation of the traffic regulations. However, if the person considers the act of violation which he/she is accused of to be true to the facts, he/she may voluntarily pay to the designated agency the minimum fine specified by the applicable Act, without having to go through the process of decision, so as to close the case." Article 41, Paragraph 1, and Article 48, Paragraph 1, of the Uniform Punishment Standard Forms and Rules for Handling the Matters of Violating Road Traffic Regulations enabled by Article 92 of the Act are merely provisions dealing with specific details for the abovementioned purposes, and have not therefore gone beyond the scope of power conferred by the enabling Act, nor are they inconsistent with the principle of legal reservation. In this respect, the case before this Yuan is distinguishable in the nature of the issues involved from Interpretation No. 423, where the Imposition of Fine Standards for Air Pollution Exhausted by Motor Vehicles, without being enabled by the Air Pollution Prevention Act, require that the violator voluntarily pay the minimum

權訂定之違反道路交通管理事件統一裁罰標準及處理細則第四十一條第一項及第四十八條第一項僅係就上開意旨為具體細節之規定，並未逾越母法之授權，與法律保留原則亦無違背，就此部分與本院釋字第四二三號解釋交通工具排放空氣污染物罰鍰標準之未經空氣污染防制法授權，以行為人自動繳納罰鍰最低額為結案方式，要屬有間。且污染空氣之行為，尚有污染源及污染物排放量之不同，主管機關復有抽驗之數據可憑，其僅以到案時間及到案與否為裁罰之準據，自與授權裁量之立法目的不符。至交通違規則單純以違反交通規則為構成要件，二者性質有別，非可相提並論。又上開細則第四十一條第二項規定：「行為人逾指定應到案日期後到案，而有前項第一款、第二款情形者，得逕依標準表逾越繳納期限之規定，收繳罰鍰結案。」另同細則第四十四條第一項規定：「違反道路交通管理事件行為人，未依規定自動繳納罰鍰，或未依規定到案聽候裁決，處罰機關應於一個月內依標準表逕行裁決之。」依上開標準表規定，凡行為人逾越繳納期限或經逕行裁決處罰者，處罰機關即一律依標準表規定之金額處以罰鍰，此屬法律授權主管機關就裁罰事宜所訂定之裁量基準，其

fine in order to close the case. The provision of said Standards is inconsistent with the purpose for which the legislature confers the power of discretion in that the amount of fine imposed thereunder is determined solely on the basis of the time the violator appears before the competent authority and the failure of the violator to appear, without taking into account the factors that differentiate the degrees of pollution caused by the conduct such as the pollution source and the quantity of pollution emission as well as the fact that the competent authority may obtain data by carrying out sample tests as the basis for determination of penalty. Therefore, an air pollution case differs from and is not comparable to a traffic violation case in that the latter is constituted by a simple act of violation of traffic regulations. Furthermore, the abovementioned Rules provide in Article 41, Paragraph 2, that "a person acting in violation of traffic regulations in any of the circumstances mentioned in either Subparagraph 1 or 2 of the preceding Paragraph, who appears before the agency after the date specified, may pay such fine as specified in the Uniform

罰鍰之額度未逾越法律明定得裁罰之上限，並得促使行為人自動繳納、避免將來強制執行困擾及節省行政成本，且寓有避免各行政機關於相同事件恣意為不同裁罰之功能，亦非法所不許。上開細則，於憲法保障人民財產權之意旨並無牴觸。至行為人對主管機關之裁罰不服，法院就其聲明異議案件，如認原裁決有違法或不當之情事，縱行為人有未依指定到案日期到案或委託他人到案者，仍得為變更處罰之裁判，乃屬當然。

Punishment Standards in respect of late payment and close the case thereupon." Article 44, Paragraph 1, of said Rules provides that "where a person acting in violation of traffic regulations fails to voluntarily pay the fine as prescribed or fails to appear at the regulatory agency to hear the decision, such agency shall make a decision at its discretion within one month on the penalty prescribed in the Uniform Punishment Standards." Under the Standards, where a traffic violator fails to make payment in time or is penalized upon a decision made at the discretion of the agency, he/she will be fined by the regulatory agency in an amount specified in the Standards. The Standards provide a standard of penalty enacted by the competent authority within its power of discretion authorized by law, and the amounts of the fines specified therein are found to be within the limit expressly prescribed by law. It also encourages the traffic violator to pay the fine voluntarily so that future enforcement may be avoided and the administrative cost may be saved. Furthermore, it embodies the function as a means to avoid possible variance in punishment

to be arbitrarily imposed by different administrative agencies for similar incidents of violation, and is permissible by law. Such rules are thus not against the spirit of the Constitution in protecting the people's property right. It follows without doubt that if the court, in a case where the party files an objection to the penalty decided by the regulatory agency, finds the decision to be improper or against the law, may deliver an adjudication to reverse the decision even though the traffic violator might have failed to appear on the specified date or to have delegated another person to appear for and on behalf of him/her.

Justice Jyun-Hsiung Su filed dissenting opinion in part.

本號解釋蘇大法官俊雄提出部分不同意見書。

J. Y. Interpretation No.512（September 15, 2000）*

ISSUE: Does the Drug Control Act, which restrains defendants sentenced to imprisonment or the payment of fines from appealing to the Supreme Court, constitute an unreasonable restriction upon the people's right of instituting legal proceedings protected by the Constitution？

RELEVANT LAWS:

Articles 7, 16 and 23 of the Constitution（憲法第七條、第十六條、第二十三條）; Articles 377 and 441 of the Code of Criminal Procedure（刑事訴訟法第三百七十七條、第四百四十一條）; Article 16 of the Drug Control Act（肅清煙毒條例第十六條）; Interpretation Nos. 393, 396, 418 and 442（司法院釋字第三九三號、第三九六號、第四一八號及第四四二號解釋）.

KEYWORDS:

right to institute legal proceedings（訴訟權）, criminal cases（刑事案件）, imprisonment（有期徒刑）, life imprisonment（無期徒刑）, court of first instance（初審法院）, appeal（上訴）, relief of extraordinary appeal（非常上訴救濟）, court of last resort（終審法院）, highest appellate court（第三審法院）.**

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* Translated by Wei-Feng Huang of THY Taiwan International Law Offices.

** Contents within frame, not part of the original text, are added for reference purpose only.

HOLDING: The objective of Article 16 of the Constitution, which protects the people's right of instituting legal proceedings, is to guarantee the people the said right in accordance with legal procedures and the right to a fair trial. The court hierarchy, litigation procedures and relevant requirements should be stipulated by the legislative authorities pursuant to laws that are just and reasonable, depending on the type, nature and policy objectives of the case in litigation and the functions of the judicial system. Article 16, first sentence, of the Narcotics Elimination Act as amended and promulgated on July 27, 1992 (amended and promulgated as the Drug Control Act on May 20, 1998) stipulates that: "Persons who violate this Article shall be brought to District Courts or one of their branches as the court of first instance, and to the High Court or its branch as the court of last resort." Appeals to the Supreme Court by the defendant are prohibited where a penalty of imprisonment or a fine has been imposed. This restriction on criminal litigation procedure is an attempt by the legislative authorities, in light of the harmful effect of narcotics

解釋文：憲法第十六條保障人民有訴訟之權，旨在確保人民有依法定程序提起訴訟及受公平審判之權利，至訴訟救濟應循之審級、程序及相關要件，應由立法機關衡量訴訟案件之種類、性質、訴訟政策目的，以及訴訟制度之功能等因素，以法律為正當合理之規定。中華民國八十一年七月二十七日修正公布之「肅清煙毒條例」（八十七年五月二十日修正公布名稱為：「毒品危害防制條例」）第十六條前段規定：「犯本條例之罪者，以地方法院或其分院為初審，高等法院或其分院為終審」，對於判處有期徒刑以下之罪，限制被告上訴最高法院，係立法機關鑑於煙毒危害社會至鉅，及其犯罪性質有施保安處分之必要，為強化刑事嚇阻效果，以達肅清煙毒、維護國民身心健康之目的，所設特別刑事訴訟程序，尚屬正當合理限制。矧刑事案件，上訴於第三審法院非以違背法令為理由不得為之。確定判決如有違背法令，得依非常上訴救濟，刑事訴訟法第三百七十七條、第四百四十一條定有明文。就第二審法院所為有期徒刑以下之判決，若有違背法令之情形，亦有一定救濟途徑。對於被告判處死刑、無期徒刑之案件則依職權送最高法院覆判，顯已顧及其利

on the society and the need to impose rehabilitative measures due to the nature of the crime, to repress the crime effectively, in order to eliminate narcotics and maintain the citizens' physical and mental well-being, and it is a just and reasonable restriction. With respect to criminal cases, appeals to the highest appellate court are prohibited unless the judgments violate the law. In the event a judgment is determined to be in violation of the law, proceedings for a remedy of extraordinary appeal may be instituted as expressly provided for in Articles 377 and 441 of the Code of Criminal Procedure. Where the intermediate appellate courts impose a penalty of imprisonment or a fine, and the rendering of such judgment is in violation of the law, relief processes are available. In cases where the defendants are sentenced to death or life imprisonment, appeals to the Supreme Court are available by operation of law. The foregoing seeks to protect the interests of the defendants and does not exceed the scope of the legislative authorities' discretion. It does not curtail the people's right of instituting legal proceedings protected by the Consti-

益，尚未逾越立法機關自由形成之範圍，於憲法保障之人民訴訟權亦無侵害，與憲法第七條及第二十三條亦無牴觸。

tution nor does it conflict with Articles 7 and 23 of the Constitution.

REASONING: The objective of Article 16 of the Constitution, which protects the people's right of instituting legal proceedings, is to guarantee the people the said right in accordance with legal procedures and the right to a fair trial. The court hierarchy, litigation procedures and relevant requirements should be stipulated by the legislative authorities pursuant to laws that are just and reasonable, depending on the type, nature and policy objectives of the case in litigation and the functions of the judicial system. The foregoing has been explicitly explained in this Yuan's Interpretation Nos. 393, 396, 418 and 442. Article 16, first sentence, of the Narcotics Elimination Act as amended and promulgated on July 27, 1992 (amended and promulgated as the Drug Control Act on May 20, 1998) stipulates that: "Persons who violate this Article shall be brought to District Courts or one of their branches as the court of first instance, and to the High Court or its branch as the court of last resort." Appeals to the Supreme Court

解釋理由書：憲法第十六條保障人民有訴訟之權，旨在確保人民有依法定程序提起訴訟及受公平審判之權利，至訴訟救濟應循之審級、程序及相關要件，應由立法機關衡量訴訟案件之種類、性質、訴訟政策目的，以及訴訟制度之功能等因素，以法律為正當合理之規定，本院釋字第三九三號、第三九六號、第四一八號、第四四二號解釋闡釋甚明。中華民國八十一年七月二十七日修正公布之「肅清煙毒條例」（八十七年五月二十日修正公布名稱為：「毒品危害防制條例」）第十六條前段規定：「犯本條例之罪者，以地方法院或其分院為初審，高等法院或其分院為終審」，對於判處有期徒刑以下之罪，限制被告上訴最高法院。此項程序，係立法機關鑑於煙毒危害社會至鉅，及其犯罪性質有施保安處分之必要，為強化刑事嚇阻效果，以達肅清煙毒、維護國民身心健康之目的，就何種情形得為上訴以及得上訴至何一審級等事項，所設特別刑事訴訟程序，尚屬正當合理限制。矧刑事案件，上訴於第三審法院非以違背法令為理由不得為之。確定判決如有

by the defendant are prohibited where a penalty of imprisonment or a fine has been imposed. This procedure is a restriction on criminal litigation procedure with regard to matters for which an appeal is available, and is an attempt by the legislative authorities, in light of the harmful effect of narcotics on the society and the need to impose rehabilitative measures due to the nature of the crime, to repress the crime effectively, in order to eliminate narcotics and maintain the citizens' physical and mental well-being, and it is a just and reasonable restriction. With respect to criminal cases, appeals to the highest appellate court are prohibited unless the judgments violate the law. In the event a judgment is determined to be in violation of the law, proceedings for a remedy of extraordinary appeal may be instituted as expressly provided for in Articles 377 and 441 of the Code of Criminal Procedure. Where the intermediate appellate courts impose a penalty of imprisonment or a fine, and the rendering of such judgment is in violation of the law, relief processes are available. In cases where the defendants are sentenced to death or life im-

違背法令，得依非常上訴救濟，刑事訴訟法第三百七十七條、第四百四十一條定有明文。就第二審法院所為有期徒刑以下之判決，若有違背法令之情形，亦有一定救濟途徑，對於被告判處死刑、無期徒刑之案件則依職權送最高法院覆判，並未逾越立法機關自由形成之範圍；且依該條例規定，已給予被告上訴第二審之權利，並未剝奪其訴訟權，與憲法第二十三條規定之比例原則尚無牴觸，且未侵害憲法保障之人民訴訟權，亦與憲法第七條規定無違。

prisonment, appeals to the Supreme Court are available by operation of law. This does not exceed the scope of the legislative authorities' discretion; moreover, the provisions in the said Articles have provided the defendant with a right to appeal to the intermediate appellate courts, without taking away his/her right of instituting legal proceedings. It does not contravene the principle of proportionality stipulated in Article 23 of the Constitution, nor does it curtail the people's right of instituting legal proceedings protected by the Constitution or conflict with Article 7 of the Constitution.

J. Y. Interpretation No.513（September 29, 2000）*

ISSUE: Is it legal for governments to expropriate privately owned land not designated for public facilities in an urban plan without changing the urban plan first?

RELEVANT LAWS:

Articles 1 and 52 of the Urban Planning Act（都市計畫法第一條、第五十二條）; Article 4, Paragraph 2, of the Act of Eminent Domain（土地徵收條例第四條第二項）; Land Act（土地法）.

KEYWORDS:

urban plan（都市計畫）, expropriation（徵收）, public facilities（公共設施）.**

HOLDING: The legislative purpose of the Urban Planning Act is to improve people's living environment and to help coordinate developments in cities, towns and villages by planning. An urban plan, once publicly declared and finalized, has immediate binding force. Unless exceptions are set forth by law, governments of all levels should use or expropriate land

解釋文：都市計畫法制定之目的，依其第一條規定，係為改善居民生活環境，並促進市、鎮、鄉街有計畫之均衡發展。都市計畫一經公告確定，即發生規範之效力。除法律別有規定外，各級政府所為土地之使用或徵收，自應符合已確定之都市計畫，若為增進公共利益之需要，固得徵收都市計畫區域內之土地，惟因其涉及對人民財產權之剝

* Translated by Professor Tze-Shiou Chien.

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without conflicting with such plan. For the necessity of enhancing public interests, governments may expropriate land within the urban plan. However, governments should strictly comply with expropriation-related requirements, procedures and other rules of the Urban Planning Act, because expropriation directly affects the people's property rights. The former part of Article 52 provides that, "Within the scope of an urban plan, governments of all levels may expropriate privately owned land or use publicly owned land, but the actions taken should not conflict with the concerned urban plan." According to the spirit of this provision, whenever central or local governments, in order to construct public facilities, have to expropriate privately owned lands which are not designated for public facilities in the urban plan, they have to change the urban plan first and expropriate such lands later. It is against the law for governments to expropriate privately owned land without changing the urban plan first. The expropriations made pursuant to the Land Act, with no legal public notice or without abiding by the thirty-day requirement,

奪，應嚴守法定徵收土地之要件、踐行其程序，並遵照都市計畫法之相關規定。都市計畫法第五十二條前段：「都市計畫範圍內，各級政府徵收私有土地或撥用公有土地，不得妨礙當地都市計畫。」依其規範意旨，中央或地方興建公共設施，須徵收都市計畫中原非公共設施用地之私有土地時，自應先踐行變更都市計畫之程序，再予徵收，未經變更都市計畫即遽行徵收非公共設施用地之私有土地者，與上開規定有違。其依土地法辦理徵收未依法公告或不遵守法定三十日期間者，自不生徵收之效力。若因徵收之公告記載日期與實際公告不符，致計算發生差異者，非以公告文載明之公告日期，而仍以實際公告日期為準，故應於實際徵收公告期間屆滿三十日時發生效力。

have no legal effect of expropriation. If there is any inconsistency between the day of public notice in fact and the day stated in the notice, the day of public notice in law should be the day in fact, not the day stated in the notice. Therefore, the expropriation comes into effect after thirty days beginning with the day of public notice in fact.

REASONING: The legislative purpose of the Urban Planning Act is to improve people's living environment and to help coordinate developments in cities, towns and villages by planning. An urban plan, once publicly declared and finalized, has immediate binding force. Unless exceptions are set forth by law, governments of all levels should use or expropriate land without conflicting with the plan. In order to enhance public interests, governments may expropriate land within the urban plan. However, governments should strictly comply with expropriation-related requirements, procedures and other rules of the Urban Planning Act, because expropriation directly affects the people's property rights.

解釋理由書：都市計畫法制定之目的，依其第一條規定，係為改善居民生活環境，並促進市、鎮、鄉街有計畫之均衡發展。都市計畫一經公告確定，即發生規範之效力。除法律別有規定外，各級政府所為土地之使用或徵收，自應符合已確定之都市計畫，若為增進公共利益之需要，固得徵收都市計畫區域內之土地，惟因其涉及對人民財產權之剝奪，應嚴守法定徵收土地之要件、踐行其程序，並遵照都市計畫法之相關規定，以實現都市計畫之目的。

The former part of Article 52 provides that, "Within the scope of an urban plan, governments of all levels may expropriate privately owned land or use publicly owned land, but the actions taken should not conflict with the concerned urban plan." The purpose of this provision is to regulate land zoning and to facilitate construction and development via the plan. The usage of land is finalized once the plan has been publicly announced. Governments of all levels should elaborately review the necessity for constructing public facilities and avoid any possible disruption of the urban plan when they are making decisions on whether to expropriate privately owned land for constructing such facilities. Therefore, unless exceptions are set forth by law (See Article 4, Paragraph 2, of the Act of Eminent Domain), whenever central or local governments, in order to construct public facilities, have to expropriate privately owned lands which are not designated for public facilities in the urban plan, they have to change the urban plan first and expropriate such lands later. It is against the law for governments to expropriate

都市計畫法第五十二條前段規定：「都市計畫範圍內，各級政府徵收私有土地或撥用公有土地，不得妨礙當地都市計畫。」旨在管制土地使用分區及藉由計畫引導建設發展，對土地使用一經合理規劃而公告確定，各級政府在徵收土地作為公共設施用地時，即應就是否為其事業所必要及有無妨礙需用土地之都市計畫詳加審查。是中央或地方興建公共設施，須徵收都市計畫範圍內原非公共設施用地之私有土地時，除法律另有規定（例如土地徵收條例第四條第二項）外，應先踐行變更都市計畫之程序，再予徵收，未經變更都市計畫即遽行徵收非公共設施用地之私有土地者，與上開規定有違，此一徵收行為性質上屬於有瑕疵之行政處分，如何救濟，乃另一問題。

privately owned land without changing the urban plan first. This type of expropriation is a defective administrative act. How to remedy this defect, however, is not in question here.

The expropriations pursuant to the Land Act, with no legal public notice or without abiding by the thirty-day requirement, have no legal effect of expropriation. If there is any inconsistency between the day of public notice in fact and the day stated in the notice, the day of public notice in law should be the day in fact not the day stated in the notice. Therefore, the expropriation comes into effect after thirty days beginning with the day of public notice in fact.

依土地法辦理徵收未依法公告或不遵守法定三十日期間者，自不生徵收之效力。若因徵收之公告記載日期與實際公告不符，致計算發生差異者，非以公告文載明之公告日期，而仍以實際公告日期為準，故應於實際徵收公告期間屆滿三十日時發生效力。

J. Y. Interpretation No.514（October 13, 2000）*

ISSUE: Does the Regulation Governing the Supervision of Amusement Parks which, without the authorization by legislative mandate, state that an arcade operator shall not permit minors under the age of 18 to enter his/her place of business on penalty of having his/her business license revoked upon the violation of the said Regulation violate Article 23 of the Constitution?

RELEVANT LAWS:

Articles 15 and 23 of the Constitution（憲法第十五條、第二十三條）; Articles 13, Subparagraph 12, and 17 of the Regulation Governing the Supervision of Amusement Parks（遊藝場業輔導管理規則第十三條第十二款、第十七條）; Article 19 and Article 26, Paragraph 2, of the Juvenile Act（少年福利法第十九條、第二十六條第二項）; Articles 33 and 47, Paragraph 2, of the Child Welfare Act（兒童福利法第三十三條、第四十七條第二項）.

KEYWORDS:

freedom to run business（營業自由）, right of work（工作權）, right of property（財產權）, administrative sanction（行政罰）.**

HOLDING: The people's freedom to run a business is protected as the

解釋文：人民營業之自由為憲法上工作權及財產權所保障。有關營業

* Translated by Professor Chin-Chin Cheng.

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right to work and the property right under the Constitution. According to Article 23 of the Constitution, the content regarding the requirements of business permission, the obligation a business should obey, and the sanctions imposed for violation of said obligation, mentioned above, should be regulated under the legislative law. If the restriction on a business is authorized under the legislative law and orders are issued as supplemental regulations, the purpose, content, and scope of the authorization should be concrete and definite. This Yuan has held the same in previous Interpretations. In order to maintain the social order, good customs of society, and the physical and mental health of children and juveniles, the Ministry of Education issued the Regulation Governing the Supervision of Amusement Parks (hereinafter the "Regulation") on March 11, 1992. Since the relevant law and system are not fully developed, the order issued under authorization is necessary for certain purposes. However, Article 13, Subparagraph 12, of the Regulation mandates that an arcade operator should not permit children and juveniles under 18 to enter his/her

許可之條件，營業應遵守之義務及違反義務應受之制裁，依憲法第二十三條規定，均應以法律定之，其內容更須符合該條規定之要件。若其限制，於性質上得由法律授權以命令補充規定時，授權之目的、內容及範圍應具體明確，始得據以發布命令，迭經本院解釋在案。教育部中華民國八十一年三月十一日台（八一)參字第一二五〇〇號令修正發布之遊藝場業輔導管理規則，係主管機關為維護社會安寧、善良風俗及兒童暨少年之身心健康，於法制未臻完備之際，基於職權所發布之命令，固有其實際需要，惟該規則第十三條第十二款關於電動玩具業不得容許未滿十八歲之兒童及少年進入其營業場所之規定，第十七條第三項關於違反第十三條第十二款規定者，撤銷其許可之規定，涉及人民工作權及財產權之限制，自應符合首開憲法意旨。相關之事項已制定法律加以規範者，主管機關尤不得沿用其未獲法律授權所發布之命令。前述管理規則之上開規定，有違憲法第二十三條之法律保留原則，應不予援用。

place of business. If the said operator fails to comply with the regulation provided under Article 13, Subparagraph 12, of the Regulation, the permission to run his/her business will be revoked under Article 17, Paragraph 3, of the Regulation. Since the revocation of permission to operate a business is related to the restriction on people's right to work and property right, it should comply with the constitutional intent. When the relevant issues are regulated under the legislative law, the agency in charge should no longer apply the order issued without the authorization made by legislative law. Article 13, Subparagraph 12, and Article 17, Paragraph 3, of the Regulation violate Article 23 of the Constitution and, therefore, should be abolished.

REASONING: The people's freedom to run a business is protected as the right to work and the property right under Article 15 of the Constitution. Based on the constitutional protection of the right to work, people are free to choose to engage in a certain business as their profession. Therefore, people are

解釋理由書：人民營業之自由為憲法第十五條工作權及財產權應予保障之一項內涵。基於憲法上工作權之保障，人民得自由選擇從事一定之營業為其職業，而有開業、停業與否及從事營業之時間、地點、對象及方式之自由；基於憲法上財產權之保障，人民並有營業活動之自由，例如對其商品之生產、

free to start or end a business and determine the office hours, location, customers, and manner of the business. Moreover, based on the constitutional protection of the property right, people are free to operate a business. For example, people are free to determine the manufacture, transaction and disposition of the goods produced by their business. According to Article 23 of the Constitution, the content regarding the requirements of business permission, the obligation a business should obey, and the sanctions imposed for violation of said obligation, mentioned above, should be regulated under the legislative law. If the restriction on a business is authorized under the legislative law and orders are issued as supplemental regulations, the purpose, content, and scope of the authorization should be concrete and definite. This Yuan has held the same in Interpretations Nos. 313, 390, 394, 443 and 510.

交易或處分均得自由為之。許可營業之條件、營業須遵守之義務及違反義務應受之制裁，均涉及人民工作權及財產權之限制，依憲法第二十三條規定，必須以法律定之，且其內容更須符合該條規定之要件。若營業自由之限制在性質上，得由法律授權以命令補充規定者，授權之目的、內容及範圍，應具體明確，始得據以發布命令，迭經本院解釋在案（本院釋字第三一三號、第三九〇號、第三九四號、第四四三號、第五一〇號解釋參照）。

In order to maintain the social order, good customs of society, and the physical and mental health of children and juveniles, the Ministry of Education issued the

教育部中華民國八十一年三月十一日以台（八一）參字第一二五〇〇號令修正發布之遊藝場業輔導管理規則，係主管機關為維護社會安寧、善良風俗

Regulation Governing the Supervision of Amusement Parks on March 11, 1992. Since the relevant law and system are not fully developed, the order issued under authorization is necessary for certain purposes. However, Article 13, Subparagraph 12, of the Regulation mandates that the arcade operator should not permit children and juveniles under 18 to enter his/her place of business. This restriction is in regard to the obligation of managing a business. It is also a restriction on the people's freedom to choose their customers, which is part of the freedom to choose one's profession. If the arcade operator fails to comply with the regulation provided under Article 13, Subparagraph 12, of the Regulation, the permission to operate the business will be revoked under Article 17, Paragraph 3, of said Regulation. The revocation of permission to operate a business is a sanction for violating this obligation. It is also related to the constitutional protection of the people's right to work and property right. Therefore, the regulation governing revocation of the permission should be regulated or authorized under the legislative law. The

及兒童暨少年之身心健康，於法制未臻完備之際，基於職權所發布之命令，固有其實際需要，惟該規則第十三條第十二款關於電動玩具業不得容許未滿十八歲之兒童及少年進入其營業場所之規定，乃經營營業須遵守之義務，為人民職業選擇自由中營業對象自由之限制，第十七條第三項關於違反第十三條第十二款規定者，撤銷營業許可之規定，乃違反義務之制裁，均涉及人民憲法上工作權及財產權之保障，依前開說明，自應有法律或法律授權之依據，始得為之。少年福利法、兒童福利法就相關事項已制定法律加以規範（少年福利法第十九條、第二十六條第二項，兒童福利法第三十三條、第四十七條第二項參照），主管機關尤不得沿用其未獲法律授權所發布之命令，蓋此為法治國家依法行政之基本要求。上開管理規則第十三條第十二款、第十七條第三項規定，違反憲法第二十三條之法律保留原則，應不予援用。又人民之行為如依當時之法律係屬違法者，自不因主管機關規範該行為所發布之職權命令，嗣經本院解釋不予適用，而得主張救濟，乃屬當然，爰併予敘明。

relevant issues have already been regulated by the Juvenile Welfare Act and the Child Welfare Act (See Article 19 and Article 26, Paragraph 2, of the Juvenile Act and Article 33 and Article 47, Paragraph 2, of the Child Welfare Act). Since the relevant issues are regulated under the legislative law, the agency in charge should no longer apply the order issued without the authorization made by the legislative law. This is the fundamental requirement of rule of law in a democratic country. Article 13, Subparagraph 12, and Article 17, Paragraph 3, of the Regulation violate Article 23 of the Constitution and, therefore, should be abolished. Moreover, if people's behavior violates the legislative law at the time of the act, they have no right to pursue the remedies under the law by asserting that their act is regulated by an order, issued by the agency in charge, which is abolished by the Interpretation made by this Yuan.

Justice Yueh-Chin Hwang filed dissenting opinion.

本號解釋黃大法官越欽提出不同意見書。

J. Y. Interpretation No.515（October 26, 2000）*

ISSUE: Where the Act for Upgrading Industries requires that an entrepreneur who has purchased and paid for the land or building in an industrial zone developed by the government must pay an additional sum of money specified by the said Act as a contribution to the industrial zone development and administration fund and the government may exercise compulsory buyback of such land or building if he/she fails to begin to make use of such land or building for the purpose approved and within the period provided by the Act, are the Enforcement Rules of the said Act constitutional in prescribing that the government in case of buyback is only required to refund the purchase price so received for the land or building, not the contribution made along with it even though the failure to use the land or building results from causes not attributable to the entrepreneur?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）; Articles 34, Paragraph 1, 35, 36, 38, 55, Paragraph 1, 58, 59 and 61 of the Act for Upgrading Industries（促進產業升級條例第三十四條第一項、第三十五條、第三十六條、第三十八條、第五十五條第一項、第五十八條、第五十九條、第六十一條）; Article 96 of the Enforcement Rules of the Act for Up-

* Translated by Raymond T. Chu.

** Contents within frame, not part of the original text, are added for reference purpose only.

grading Industries（促進產業升級條例施行細則第九十六條）; Article 6 of the Regulation Governing the Management and Use of the Industrial Park Development and Administration Fund（工業區開發管理基金收支保管及運用辦法第六條）.

KEYWORDS:

unjust enrichment in public law（公法上之不當得利）, special common levies（特別公課）, compulsory buyback（強制收買）, Industrial zone development and administration fund（工業區開發管理基金）.**

HOLDING: Under Article 38 of the Act for Upgrading Industries as promulgated on December 29, 1990, where an industrial entrepreneur who has leased or purchased any parcel of land or any standard factory building in an industrial zone fails to begin to make use of such land or building pursuant to the approved plan within one year from the date on which an approval is granted for the establishment of a factory as required by Article 35 of the Act, or fails to begin to make use of same within the period of extension granted under Article 36 of the Act, or uses such land or building for any purpose

解釋文：中華民國七十九年十二月二十九日公布之促進產業升級條例第三十八條關於興辦工業人租購工業區土地或標準廠房，未依該條例第三十五條於核准設廠之日起一年內，按照核定計畫開始使用，或未於第三十六條所定延展期間內開始使用，或不依核定計畫使用者，得由工業主管機關照土地或廠房原購買價格（其屬廠房或自行興建之建築改良物者，則應扣除房屋折舊）強制收買之規定，係為貫徹工業區之土地廠房應爭取時效作符合產業升級及發展經濟目的而使用，並避免興辦工業人利用國家開發之工業區及給予租稅優惠等獎勵措施，購入土地廠房轉售圖利或作

other than that proposed in the approved plan, the authority in charge of industry may exercise compulsory buyback of such land or factory building, as the case may be, at the original selling price (less depreciation value in case of a factory building or construction built by the purchaser on the land). This legislation is intended to ensure that the land and factory buildings in industrial zones will be put to timely use consistent with the purpose of upgrading industries and developing the national economy as well as preventing the entrepreneur's resale of the land or building for profit by taking advantage of the development made by the State and the tax benefits and other incentives offered by the government. It is therefore essential to the promotion of the public interest and is consistent with the principle of proportionality embodied in Article 23 of the Constitution as well as the purpose of the Constitution in protecting the property right of the people.

不合目的之使用，乃增進公共利益所必要，符合憲法第二十三條之比例原則，與憲法保障財產權之意旨並無牴觸。

Additionally, under Article 34, Paragraph 1, of the Act, when land, a standard factory building, or any other building in

上開條例第三十四條第一項規定，工業主管機關依本條例開發之工區，除社區用地外，其土地、標準廠房

an industrial zone developed by the authority in charge of industry under this Act, with the exception of land for community development, is offered for sale, the purchaser of the land, standard factory building or any other building shall pay a contribution to the industrial zone development and administration fund in an amount equal to three percent (3%) or one percent (1%), respectively, of the purchase price. The contribution is a levy charged only on the entrepreneurs purchasing land, standard factory buildings or other buildings in an industrial zone to help finance the development and administration of the industrial zone, and is similar in nature to the special common levies and users' fees charged to all members of a group with common interest rather than a part of the purchase price for the land or building. Article 96 of the Enforcement Rules of the Act provides: "The terms 'original purchase price of the land' and 'original purchase price' in Article 38, Paragraph 1, Subparagraph 1, of the Act do not include the money paid together with the purchase price at the time of purchase as contribution to the industrial

業或各種建築物出售時，應由承購人分別按土地承購價額或標準廠房、各種建築物承購價額百分之三或百分之一繳付工業區開發管理基金。此一基金係專對承購工業區土地、廠房及其他建築物興辦工業人課徵，用於挹注工業區開發及管理之所需，性質上相當於對有共同利益群體者所課徵之特別公課及使用規費，並非原購買土地或廠房等價格之一部分，該條例施行細則第九十六條：「本條例第三十八條第一項第一款所稱原購買地價及原購買價格，不包括承購時隨價繳付之工業區開發管理基金」，此對購買土地及廠房後未能於前開一年內使用而僅繳付價金者，固無不合。惟興辦工業人承購工業區土地或廠房後，工業主管機關依上開條例第三十八條之規定強制買回，若係由於非可歸責於興辦工業人之事由者，其自始既未成為特別公課徵收對象共同利益群體之成員，亦不具有繳納規費之利用關係，則課徵工業區開發管理基金之前提要件及目的均已消失，其課徵供作基金款項之法律上原因遂不復存在，成為公法上之不當得利。依上開細則之規定，該管機關僅須以原價買回，對已按一定比例課徵作為基金之款項，不予返還，即與憲法保障人民權利之意旨有違，該細則此部分

zone development and administration fund." This provision will not give rise to any problem in the case where the purchaser of land or building, although having failed to put the property to use within the one-year period as specified, has paid only the purchase price. If, however, the reason for the competent authority to exercise the compulsory buyback under Article 38 of the Act after an entrepreneur has bought the land or building is because of the occurrence of an event not attributable to the entrepreneur, the entrepreneur is not, ab initio, a member of the group with common interest to whom special common levies may be charged, nor has he/she entered into any utilitarian relation whereby he/she is obligated to pay such charges and fees. The condition and purpose for the collection of contributions to the development and administration fund being void, the legal ground for such levies as a part of the fund no longer exists, and any contribution received then becomes unjust enrichment in public law. It follows that said article of the Enforcement Rules, in granting the competent authority the right to buy back at the

規定，並不排除上述返還請求權之行使。至興辦工業人有無可歸責事由，是否已受領其他相當之補償，係屬事實認定問題，不在本解釋範圍，併此指明。

original price without requiring the refund of the sum paid into the fund as a contribution thereto and levied at specified percentage, is in conflict with the purpose of the Constitution in protecting the right of the people and shall no longer be operative so as to preclude claims for restitution. The issues of whether the occurrence of any event is attributable to the entrepreneur and whether he/she has received any other fair compensation are matters to be determined based on facts, and are beyond the scope of this Interpretation.

REASONING: The Act for Upgrading Industries as promulgated on December 29, 1990, provides in Article 35 (now Article 58 of the Act as amended on December 31, 1999): "An industrial entrepreneur who has leased or purchased land in an industrial zone shall commence the use of such land pursuant to the approved plan within one year from the date on which an approval for the establishment of a factory is granted. An entrepreneur who is unable to commence the use of the land within such period for any reason may file an application with the au-

解釋理由書：中華民國七十九年十二月二十九日公布之促進產業升級條例第三十五條（八十八年十二月三十一日修正公布之現行條例第五十八條）及第三十六條（現行條例第五十九條）分別規定：「興辦工業人租購工業區土地，應於核准設廠之日起一年內，按照核定計畫開始使用。興辦工業人因故未能如期開始使用時，得報經工業主管機關核准展延之。但以一次為限，並不得超過一年。」「興辦工業人租購工業區土地或標準廠房，應按照核定計畫完成使用，並取得工廠登記證。興辦工業人因故未能如期完成使用時，得申請展

thority in charge of industry for an extension of the period. However, only one extension may be granted for a period up to one year," and in Article 36 (now Article 59 of the amended Act): "An industrial entrepreneur who has leased or purchased land or any standard factory building in an industrial zone shall complete the use of such land or building pursuant to the approved plan and shall obtain a factory registration certificate. An entrepreneur who is unable to complete the use of such land or building within the specified time limit for any reason may apply for an extension of the time limit. However, only three extensions may be granted, and the length of extension shall not exceed three years." Additionally, Article 38 (now Article 61) of the Act provides: "Where an industrial entrepreneur who has leased or purchased any parcel of land or any standard factory building in an industrial zone fails to comply with Article 35 or 36 hereof or fails to make use of such land or building pursuant to the approved plan, the authority in charge of industry may take any of the following actions: 1) To exercise compulsory buy-

期。但以三次為限，並不得超過三年。」同條例第三十八條（現行條例第六十一條）則規定：「興辦工業人租購之工業區土地或標準廠房，違反第三十五條或第三十六條或不依核定計畫使用者，得由工業主管機關依左列規定處理：一、承購之土地，照原購買地價強制收買；承購之標準廠房，照原購買價格，扣除房屋折舊後之餘額強制收買。二、租用之土地或標準廠房，終止租約收回。前項強制收買或收回之土地，其地上由興辦工業人自行興建之建築改良物，按其興建當時之價格，扣除房屋折舊後之餘額補償之。」此一強制買回之條款，旨在貫徹工業區之土地廠房應爭取時效作符合產業升級及發展經濟目的使用，並避免興辦工業人利用國家開發之工業區及給予租稅優惠等獎勵措施，購入土地廠房轉售圖利或作不合目的之使用；凡有不於前述法定期間依核定計畫開始使用，或雖開始使用而不符原核定計畫者，不問其原因為何，工業主管機關均得強制買回，乃增進公共利益所必要，符合憲法第二十三條之比例原則，與憲法保障財產權之意旨亦無牴觸。

back of such land at the original selling price or, as the case may require, to exercise compulsory buyback of such building at the original selling price less depreciation value of the building; or 2) To terminate the lease and repossess the land or building leased. For construction that may have been built by the entrepreneur on the land to be bought back or repossessed on a compulsory basis under the preceding paragraph, compensation shall be allowed in an amount equal to the remainder of the original cost of construction less depreciation value of the construction." The provision for compulsory buyback is intended to ensure that land and factory buildings in industrial zones will be put to timely use consistent with the purposes of upgrading industries and developing the national economy as well as preventing the entrepreneur's resale of the land or building for profit by taking ad-vantage of the development made by the State and the tax benefits and other incentives offered by the government. It is therefore essential to the promotion of the public interest that the competent authority is given the right to buy back on a compulsory basis if

the land or building is not put to use within the statutory time limit pursuant to the approved plan or, even if it is used, the use is different from the approved plan, regardless of the reason therefor. We hold that this Act is consistent with the principle of proportionality embodied in Article 23 of the Constitution as well as the purpose of the Constitution in protecting the property right of the people.

Article 34, Paragraph 1, of said Act (now Article 55, Paragraph 1) provides: "When land, a standard factory building, or any other building in an industrial zone developed by the authority in charge of industry under this Act, with the exception of land for community development, is offered for sale, the purchaser shall pay a contribution to the industrial park development and administration fund at the rates specified as follows: 1) For land: three percent (3%) of the purchase price; or 2) For standard factory buildings or other buildings: one percent (1%) of the purchase price." The purposes for which the fund may be used are prescribed in Article 6 of the " Regulation Governing

上開條例第三十四條第一項（現行條例第五十五條第一項）規定：「工業主管機關依本條例開發之工業區，除社區用地外，其土地、標準廠房或各種建築物出售時，應由承購人按下列規定，繳付工業區開發管理基金：一、土地按承購價額繳付百分之三。二、標準廠房或各種建築物按承購價額繳付百分之一。」此一基金之用途依行政院八十年十月七日發布之工業區開發管理基金收支保管及運用辦法第六條之規定包括：「一、工業區開發之投資或貸款或參加投資於工業區相關之事業。二、工業主管機關依本條例第三十八條規定強制收買或收回工業區土地、標準廠房或補償興辦工業人自行興建之建築改良物所需資金。三、已開發之工業區，其土

the Management and Use of the Industrial Park Development and Administration Fund " issued by the Executive Yuan on October 7, 1991, to include: "(1) Investment in or loan for development of industrial zones or joint investment in businesses related with industrial zones; (2) Funds needed by the authority in charge of industry for compulsory buyback or repossession of land or a standard factory building or for compensation to be granted for construction built by the entrepreneur on the land purchased or leased under Article 38 of the Act; (3) Where the land cost of a developed industrial zone has become higher than the price of land in an adjacent area available for similar use because of accumulation of interest accrued on the development cost as a result of long-term lack of sale of the land, the interest accrued on loans out of the Fund may be used to subsidize such land cost; (4) Expenses for research, planning, and publicity activities in connection with the development of industrial zones and expenditures of the Committee for the Safekeeping and Application of the Fund and the organization in charge of the ad-

地經較長期間仍未出售，由於開發成本利息之累積，致售價超過附近使用性質相同土地之地價時，得以本基金貸款利息補貼之。四、工業區開發相關之研究規劃、宣導經費及本基金保管運用委員會與工業區管理機構之經費。五、金融機構轉貸本基金之手續費。六、其他有關支出。」是基金係專對承購工業區土地、廠房及其他建築物興辦工業人課徵，用於挹注工業區開發及管理之所需，性質上相當於對有共同利益群體者所徵收之特別公課及使用規費，並非原購買土地或廠房等價格之一部分，該條例施行細則第九十六條：「本條例第三十八條第一項第一款所稱原購買地價及原購買價格，不包括承購時隨價繳付之工業區開發管理基金」，此對購買土地及廠房後未能於前開一年內使用而僅繳付價金者，固無不合。惟興辦工業人承購工業區土地或廠房後，工業主管機關依上開條例第三十八條之規定強制買回，若係由於非可歸責於興辦工業人之事由者，其自始既未成為特別公課徵收對象共同利益群體之成員，亦不具有繳納規費之利用關係，則課徵工業區開發管理基金之前提要件及目的均已消失，且原興辦工業人若於遭強制買回之後，另行選擇其他工業區買地設廠，並不能

ministration of the industrial zone; (5) Financial institutions' fees for handling loans financed by the Fund; and (6) Other related expenses." Accordingly, the contribution is a levy charged only on the entrepreneurs purchasing land, standard factory buildings or other buildings in an industrial zone to help finance the development and administration of the industrial zone, and is similar in nature to the special common levies and users' fees charged to all members of a group with common interest rather than a part of the purchase price for the land or building. Article 96 of the Enforcement Rules of the Act provides: "The terms 'original purchase price of the land' and 'original purchase price' in Article 38, Paragraph 1, Subparagraph 1, of the Act do not include the money paid together with the purchase price at the time of purchase as contribution to the industrial zone development and administration fund." This provision will not give rise to any problem in the case where the purchaser of land or building, although having failed to put the property to use within the one-year period as specified, has paid only the purchase

以前此繳納作為管理開發基金之款項抵充，仍須再次由主管機關按規定比例課徵，是以上述繳納作為基金之款項，就此而言，亦無不予返還之理由。

price. If, however, the reason for the competent authority to exercise the compulsory buyback under Article 38 of the Act after an entrepreneur has bought the land or building is because of the occurrence of an event not attributable to the entrepreneur, the entrepreneur is not, ab initio, a member of the group with common interest to whom special common levies may be charged, nor has he/she entered into any utilitarian relation whereby he/she is obligated to pay such levies and fees. Consequently, the condition and purpose for the collection of contributions to the development and administration fund do not exist. Moreover, suppose the original entrepreneur chooses after the compulsory buyback to purchase a new plant site in another industrial zone, he/she will not be credited for the amount of contribution paid by him/her for the previous development and administration fund. Rather, he/she will be taxed once again by the competent authority for such contribution at a specified percentage. Therefore, we see no reason for the government to keep the money paid as contribution to the [previous] fund.

The legal ground for such levies as a part of the fund being no longer in existence in case of the entrepreneur's failure to begin the use of the industrial land or building purchased by him/her within the statutory time limit pursuant to the approved plan is caused by the occurrence of an event not attributable to the entrepreneur, any money received has then become unjust enrichment in public law, and the entrepreneur is of course entitled to institute an action for refund of his/her payment under the Administrative Proceedings Act. It follows that said article of the Enforcement Rules, in granting the competent authority the right to buy back at the original price without requiring the refund of the sum paid into the fund as a contribution thereto and levied at a specified percentage, is in conflict with the purpose of the Constitution in protecting the right of the people and shall no longer be operative so as to preclude claims for restitution. The issues of whether the occurrence of any event is attributable to the entrepreneur and whether he/she has received any other fair compensation are matters to be determined based on facts,

因不可歸責之事由致興辦工業人未能於法定期間內依核定開始使用在工業區購得之土地或廠房，其課徵供作基金款項之法律上原因既已不存在，則構成公法上之不當得利，該興辦工業人自得依現行行政訴訟法提起給付訴訟。依上開細則之規定，該管機關僅須以原價買回，對已按一定比例課徵作為基金之款項，不予返還，即與憲法保障人民權利之意旨有違，該細則此部分規定，並不排除上述返還請求權之行使。至興辦工業人有無可歸責事由，是否已受領其他相當之補償，係屬事實認定問題，不在本解釋範圍，併此指明。

and are beyond the scope of this Interpretation.

J. Y. Interpretation No.516（October 26, 2000）*

ISSUE: J. Y. Interpretation No. 110 states that a disposition of eminent domain should not be invalidated retroactively due to the government authority's failure to pay the compensation, including the amount added by the committee resolution in the objection procedures, within the time limit prescribed by the Land Act. Does the said Interpretation contradict Article 15 of the Constitution, which protects the people's property rights?

RELEVANT LAWS:

Article 15 of the Constitution（憲法第十五條）; Articles 227, 233, 235 and 237 of the Land Act（土地法第二百二十七條、第二百三十三條、第二百三十五條、第二百三十七條）; Article 22, Paragraph 4 of the Act of Eminent Domain（土地徵收條例第二十二條第四項）.

KEYWORDS:

expropriation（徵收）, fair compensation（合理補償）, prompt compensation（儘速補償）, retroactivity（溯及既往）, property rights（財產權）.**

HOLDING: Although the State may expropriate the people's property according to the law when it is necessary

解釋文：國家因公用或其他公益目的之必要，雖得依法徵收人民之財產，但應給予合理之補償。此項補償乃

* Translated by Pijan Wu.

** Contents within frame, not part of the original text, are added for reference purpose only.

for the purpose of public use or other public interests, fair compensation shall be given. This compensation is due to the expropriation of property. For owners of expropriated property, this is a specific sacrifice for public interests, and the State shall compensate for the loss with regard to the deprivation of property or the constraint on rights. Hence, in light of the purpose of Article 15 of the Constitution to protect the property rights of the people, compensation shall not only be fair, but also be prompt. Accordingly, Article 233 of the Land Act provides that land price and other compensation due to the expropriation of land shall be given no later than "fifteen days after expiration of the period of public disclosure." Although this statutory period may be extended upon the land authority's presentation of the case to the committee for resolution, due to objection on the compensation for expropriation, the authority shall notify the condemner immediately after the amount of compensation is determined by resolution, and pay the compensation to the landowner within a period not exceeding 15 days as provided in the Land Act

因財產之徵收，對被徵收財產之所有人而言，係為公共利益所受之特別犧牲，國家自應予以補償，以填補其財產權被剝奪或其權能受限制之損失。故補償不僅需相當，更應儘速發給，方符憲法第十五條規定，人民財產權應予保障之意旨。準此，土地法第二百三十三條明定，徵收土地補償之地價及其他補償費，應於「公告期滿後十五日內」發給。此項法定期間，雖或因對徵收補償有異議，由該管地政機關提交評定或評議而得展延，然補償費額經評定或評議後，主管地政機關仍應即行通知需用土地人，並限期繳交轉發土地所有權人，其期限亦不得超過土地法上述規定之十五日（本院院字第二七〇四號、釋字第一一〇號解釋參照）。倘若應增加補償之數額過於龐大，應動支預備金，或有其他特殊情事，致未能於十五日內發給者，仍應於評定或評議結果確定之日起於相當之期限內儘速發給之，否則徵收土地核准案，即應失其效力。行政法院八十五年一月十七日庭長評事聯席會議決議略謂：司法院釋字第一一〇號解釋第三項，固謂徵收土地補償費額經標準地價評議委員會評定後，主管機關通知並轉發土地所有權人，不得超過土地法第二百三十三條所規定之十五日期限，

(See Interpretation Yuan-tze No. 2704 and Interpretation No. 110). In the event the compensation is increased by an enormous amount, requiring the expenditure of the reserve fund, or that there are other special circumstances leading to the inability to pay the compensation within fifteen days, the compensation shall still be paid within a reasonable period of time after the date of confirmation of such committee resolution. Otherwise, the approval of the eminent domain shall no longer be in effect. The Resolution of the Administrative Court Joint Convention (January 17, 1996) states the following: Interpretation No. 110, Paragraph 3, provides that after the amount of compensation for expropriation of land is determined by the Standard Land Value Determination Committee, the notification and payment of the compensation to the landowner by the competent authority shall not exceed the fifteen-day period as provided by Article 233 of the Land Act; nevertheless, even if it exceeds the 15-day period, the confirmed expropriation disposition could not become invalid retroactively. The portion of the abovementioned

然縱已逾十五日期限，無從使已確定之徵收處分溯及發生失其效力之結果云云，其與本解釋意旨不符部分，於憲法保障人民財產權之旨意有違，應不予適用。

Resolution, which is inconsistent with this Interpretation and is in violation of the purpose of constitutional protection of the people's property rights, shall no longer be applicable.

REASONING: Article 15 of the Constitution provides that the people's property rights shall be protected. Its objective is to safeguard individuals' use, profit and disposition of the property according to its existing conditions, and against the infringement by governmental power or third persons. Although the State may expropriate the people's property according to the law when it is necessary for the purpose of public use or other public interests, fair compensation shall be given. This compensation is due to the expropriation of property. For owners of expropriated property, this is a specific sacrifice for the public interest, and the State shall compensate for the loss with regard to the deprivation of property or the constraint on rights. Hence, in light of the purpose of the Constitution to protect the property rights of the people (See Interpretations Nos. 400 and 425), compen-

解釋理由書：憲法第十五條規定，人民之財產權應予保障。此一規定旨在確保個人依財產之存續狀態，行使其自由使用、收益及處分之權能，並免於遭受公權力或第三人之侵害。國家因公用或因其他公益目的之必要，雖得依法徵收人民之財產，但應給予合理之補償。此項補償乃係因財產徵收，對被徵收財產之所有人而言，係為公共利益所受之特別犧牲，國家自應予以補償，以填補其財產權被剝奪或其權能受限制之損失。故補償不僅需相當，為減少財產所有人之損害，更應儘速發給，方符憲法上開保障人民財產權之意旨（本院釋字第四〇〇號、第四二五號解釋參照）。準此，土地法第二百三十三條前段規定：「徵收土地應補償之地價及其他補償費，應於公告期滿後十五日內發給之。」此項期間雖或因對徵收補償有異議，經該管地政機關提交評定或評議而得展延，但補償費額一經評定或評議後，主管地政機關仍應即行通知需用土

sations shall not only be fair, but also be prompt in order to minimize the loss to the owner of the property. Accordingly, the first sentence of Article 233 of the Land Act provides that "land price and other compensation due to the expropriation of land shall be given no later than fifteen days after expiration of the period of public disclosure." Although this statutory period may be extended upon the land authority's presentation of the case to the committee for resolution, due to objection on the compensation for expropriation, the authority shall notify the condemner immediately after the amount of compensation is determined by resolution, and pay the compensation to the landowner within a period not exceeding 15 days as provided in the Land Act (See Interpretation Yuan-tze No. 2704 and Interpretation No. 110). The strict requirement of the aforementioned expropriation proceedings is to enforce the constitutional principle to protect the people's property rights when the State expropriates for public use in light of the public interest (See Interpretation No. 409). With respect to the publicly announced amount

地人，並限期繳交，以轉發應受補償人，其期限亦不得超過土地法第二百三十三條規定之十五日（本院院字第二七〇四號、釋字第一一〇號解釋參照）。上述徵收程序之嚴格要求，乃在貫徹國家因增進公共利益為公用徵收時，亦應兼顧確保人民財產權益之憲法意旨（本院釋字第四〇九號解釋意旨參照）。對於土地法第二百二十七條所公告，被徵收土地應補償之費額，應受補償人有異議，而拒絕受領，依土地法第二百三十七條第一項第一款規定，得將款額提存之，但該項應補償之費額，如於提交評定或評議後，認應增加給付時，應增加發給之補償數額，倘未經依法發給，徵收處分即不得謂已因辦理上述提存而不影響其效力。此為有徵收即有補償，補償之發給與徵收土地核准處分之效力間，具有不可分之一體性所必然。觀諸土地法第二百三十五條前段規定，「被徵收土地之所有權人，對於其土地之權利義務，於應受補償發給完竣時終止」亦明。至若應增加補償之數額過於龐大，需用土地人（機關）需動支預備金支應，或有其他特殊情事，致未能於十五日內發給者，仍應於評定或評議結果確定之日起於相當之期限內儘速發給之（依民國八十九年二月二日公布之土地

of compensation for expropriation of land as provided in Article 227 of the Land Act, the amount may be deposited according to Article 237, Paragraph 1, Subparagraph 1, when the recipient objects and refuses to accept the compensation. However, if the additional amount of compensation as determined by the committee's resolution is not paid pursuant to the law, the expropriation disposition shall be invalidated despite the completion of the aforementioned deposit. In other words, whenever there is an expropriation, there shall be compensation. It necessarily follows that the payment of compensation and the validity of the approval disposition for eminent domain are integral and inseparable. This point can also be supported by the first sentence of Article 235 of the Land Act, which provides that: "The rights and duties of the landowner regarding the land being expropriated shall terminate at the completion of the payment of compensation." In the event the compensation is increased by an enormous amount, requiring the expenditure of the reserve fund by the condemner (the government agency), or that there are

徵收條例第二十二條第四項為三個月），否則徵收土地核准案，即應失其效力。行政法院八十五年一月十七日庭長評事聯席會議決議略謂：司法院釋字第一一〇號解釋第三項，固謂徵收土地補償費額經標準地價評議委員會評定後，主管機關通知並轉發土地所有權人，不得超過土地法第二百三十三條所規定之十五日期限，然縱已逾十五日期限，無從使已確定之徵收處分溯及發生失其效力之結果云云，其與本解釋意旨不符部分，於憲法保障人民財產權之旨意有違，應不予適用。

other special circumstances leading to the inability to pay the compensation within fifteen days, the compensation shall still be paid within a reasonable period of time after the date of confirmation of such committee resolution. (According to the Act of Eminent Domain, Article 22, Paragraph 4 (February 2, 2000), the period is 3 months.) Otherwise, the approval of eminent domain shall no longer be in effect. The Resolution of the Administrative Court Joint Convention (January 17, 1996) states the following: Interpretation No. 110, Paragraph 3, provides that after the amount of compensation for expropriation of land is determined by the Standard Land Value Determination Committee, the notification and payment of the compensation to the landowner by the competent authority shall not exceed the fifteen-day period as provided by Article 233 of the Land Act; nevertheless, even if it exceeds the 15-day period, the confirmed expropriation disposition could not become invalid retroactively. The portion of the abovementioned Resolution, which is inconsistent with this Interpretation and is in violation of the purpose of

constitutional protection of the people's property rights, shall no longer be applicable.

J. Y. Interpretation No.517（November 10, 2000）*

ISSUE: Does Article 11 of the Act Governing the Punishment of Offences Against Military Service requiring reservists to report the movement of their residences and setting forth criminal punishment for non-compliance with such duty place a restraint on the freedom of residence and migration of reservists as protected by the Constitution?

RELEVANT LAWS:

Articles 10, 20, 23 and 137, Paragraph 1 of the Constitution（憲法第十條、第二十條、第二十三條、第一百三十七條第一項）; Articles 6, 7 and 11, Paragraph 1, Subparagraph 3, Paragraph 3 of the Act Governing the Punishment of Offences Against Military Service（妨害兵役治罪條例第六條、第七條、第十一條第一項第三款、第三項）; J. Y. Interpretation No. 454（司法院釋字第四五四號解釋）; Articles 54 and 59 of the Immigration Act（入出國及移民法第五十四條、第五十九條）.

KEYWORDS:

military service（兵役）, reservist（後備軍人）, report（申報）, recall（召集）, attempt to evade recall（意圖避免召集）, freedom of residence and movement（居住遷徙自由）, offender of abstract danger（抽象危險犯）.**

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* Translated by Raymond T. Chu.

** Contents within frame, not part of the original text, are added for reference purpose only.

HOLDING: It is explicitly prescribed in Article 20 of the Constitution that the people shall have the duty of performing military service in accordance with law. However, the Constitution says nothing about the military service system and how the recruitment and conscription of troops will be implemented. Accordingly, matters relating to recruiting and recalling the people to serve in the armed forces and the sanctions for violation of such duty must be prescribed by law to be enacted by the legislature by taking into consideration the need of national security and social development. Under the Act Governing the Punishment of Offences Against Military Service, Article 11, Paragraph 1, Subparagraph 3, a reservist who fails to report relocation of his residence as required without a good cause is liable to criminal punishment. The purpose of the provision is to ensure effective implementation of military recall plans for national defense and to maintain the system of recall of all reservists. It merely imposes on all reservists the duty to report the relocation of their residence but does not restrain their freedom of residence and

解釋文：人民有依法律服兵役之義務，為憲法第二十條所明定。惟兵役制度及其相關之兵員召集、徵集如何實施，憲法並無明文規定，有關人民服兵役、應召集之事項及其違背義務之制裁手段，應由立法機關衡酌國家安全、社會發展之需要，以法律定之。妨害兵役治罪條例第十一條第一項第三款規定後備軍人居住處所遷移，無故不依規定申報者，即處以刑事罰，係為確保國防兵員召集之有效實現、維護後備軍人召集制度所必要。其僅課予後備軍人申報義務，並未限制其居住遷徙之自由，與憲法第十條之規定尚無違背。同條例第十一條第三項規定後備軍人犯第一項之罪，致使召集令無法送達者，按召集種類於國防安全之重要程度分別依同條例第六條、第七條規定之刑度處罰，乃係因後備軍人違反申報義務已產生妨害召集之結果，嚴重影響國家安全，其以意圖避免召集論罪，仍屬立法機關自由形成之權限，與憲法第二十三條之規定亦無牴觸。至妨害兵役治罪條例第十一條第三項雖規定致使召集令無法送達者，以意圖避免召集論，但仍不排除責任要件之適用，乃屬當然。

migration, and is therefore not in conflict with Article 10 of the Constitution. The Act further provides in Article 11, Paragraph 3, that a reservist who commits any of the offenses specified in Paragraph 1 thereof, thereby making it impossible to serve on him the order of recall, shall be liable to the punishment as specified in Article 6 or 7 of the Act depending on the type of the recall in relation to the degree of importance to the national defense. The underlying reason is that non-compliance to the duty to report results in obstruction to recall and thereby seriously affects the national security. To make such an act punishable as a crime of intent to evade draft is a power developed by discretion of the legislature and is not in conflict with Article 23 of the Constitution. With regard to the provision of Article 11, Paragraph 3, of the same Act that, where failure to report has made the order of recall undeliverable the case will be dealt with in the same manner as an attempt to evade the recall, it goes without saying that in applying this provision the elements required for imputation of the liability must not be disregarded.

REASONING: It is explicitly prescribed by Article 20 of the Constitution that the people shall have the duty of performing military service in accordance with law. However, the Constitution says nothing about the military service system and how the recruitment and conscription of troops will be implemented. In modern rule-of-law countries, the military service system is directly concerned with the need of national defense, and a secure national defense enables a country to resist possible invasion, thereby safeguarding the people's fundamental rights such as those in respect of their life, body, freedom, and property. Article 137 of the Constitution states that "the national defense of the Republic of China shall have as its objective the safeguarding of national security and the preservation of world peace." Accordingly, matters relating to calling up and recalling the people to serve in the armed forces and the sanctions for violation of such duty must be prescribed by law to be enacted by the legislature by taking into consideration the need of national security and social development.

解釋理由書：人民有依法律服兵役之義務，為憲法第二十條所明定。惟兵役制度及其相關之兵員召集、徵集如何實施，憲法並無明文規定。而現代國家之兵役制度乃與國防需求直接關連，國防健全，能抵禦外來之侵犯，人民之生命、身體、自由、財產等基本權利方得確保，憲法第一百三十七條第一項即規定：「中華民國之國防，以保衛國家安全，維護世界和平為目的。」因此，有關人民服兵役、應召集之事項及其違背義務之制裁手段，應由立法機關衡酌國家安全、社會發展之需要，以法律定之。

It must be noted that whether an act in violation of a duty under administrative law should be liable to administrative penalty or criminal punishment is an issue within the scope of power of legislative discretion and is subject to determination by the legislature by taking into account such factors as the nature of the event, the degree of detriment to legal rights and interests, and the effects of the control that the legislature intends to achieve. Insofar as such penalty does not go beyond the principle of proportionality, it should not be considered unconstitutional. In other words, the legislature, with its power of legislative discretion, may enact provisions for different types of punishment for acts in violation of law. Take the case of illegal entry into or exit from the country, for example. The Immigration Act sets out, in addition to sanctions by administrative fines under Article 59, criminal punishment under Article 54 for difference regulatory purposes. Thus, in case of an act in violation of a duty under administrative law, the fact that administrative penalties are specified by a statute for such violation does not prevent the pre-

按違反行政法上義務之制裁究採行政罰抑刑事罰，本屬立法機關衡酌事件之特性、侵害法益之輕重程度以及所欲達到之管制效果，所為立法裁量之權限，苟未逾越比例原則，要不能遽指其為違憲。即對違反法律規定之行為，立法機關本於上述之立法裁量權限，亦得規定不同之處罰，以不依規定入出境而言，入出國及移民法第五十九條固以罰鍰作為制裁方法，但同法第五十四條基於不同之規範目的，亦有刑罰之規定，並非謂對行政法上義務之違反，某法律一旦採行政罰，其他法律即不問保護法益有無不同，而不得採刑事罰。本此，關於妨害兵役之行為，立法機關自得審酌人民服兵役應召集之國防重要性、違背兵役義務之法益侵害嚴重性，以及其處罰對個人權益限制之程度，分別依現役或後備役兵員於平時或戰時之各種徵集、召集類型，為適切之規範。妨害兵役治罪條例第十一條第一項第三款規定後備軍人「居住處所遷移，無故不依規定申報者」，處一年以下有期徒刑、拘役或三百元以下罰金；同條第三項規定後備軍人犯第一項之罪，致使召集令無法送達者，以意圖避免召集論，分別依第六條、第七條科刑，乃因後備軍人於相當期間內實際居住處所與戶籍登記不

scription of criminal punishment by other statutes regardless of whether there is any difference in the legal rights and interests to be protected. It also follows that, for offenses against military service, the legislature is empowered to make appropriate prescriptions in respect of different categories of conscription and recall made during peacetime and wartime of servicemen in active or reserve service by taking into consideration the degree of importance of such conscription or recall to national defense, the seriousness of the detriment to legal rights and interests, and the extent of restraint on personal interest resulting from the punishment. Under the Act Governing the Punishment of Offences Against Military Service, Article 11, Paragraph 1, Subparagraph 3, a reservist who "fails to report the relocation of his residence as required without good cause" is liable to punishment of imprisonment for not more than one year or detention or a fine of not more than 300 yuan. The Act further provides in Article 11, Paragraph 3, that a reservist who commits any of the offenses specified in Paragraph 1 thereof, thereby making it

符，所涉兵役法規立法目的下之公共利益，與入出國及移民法僅涉及一般國民之入出國管理部分者並不相同，故立法機關考量管制後備軍人動態之需要、違反申報義務之法益侵害，為確保國防兵員召集之有效實現、維護後備軍人召集制度之必要，採取抽象危險犯刑事制裁手段，可謂相當。且法院於個案審理中，仍得斟酌該後備軍人違反義務之各種情狀，於法定刑範圍內為適當之量刑，是無立法嚴苛情形，與憲法第二十三條規定之比例原則尚無不合。至妨害兵役治罪條例第十一條第三項雖規定致使召集令無法送達者，以意圖避免召集論，但仍不排除責任要件之適用，乃屬當然。

impossible to serve on him the order of recall, shall be deemed to have committed an act with intent to evade draft and be liable to punishment as specified in Article 6 or 7 of the Act. The reason underlying the law is that the situation where the actual residence of a reservist during a specific period does not correspond with the address in his family registration is relevant to the public interest contemplated by the legislature in enacting military service laws, and that it differs from an act of violation of the Immigration Act in that the latter involves only the control over the exit and entry of ordinary citizens. It is thus appropriate that the legislature, taking into consideration the necessity to control the movement of reservists and the damage to legal interest to be caused by an act of non-compliance with the duty to report, adopts measures of criminal sanction on offenders of abstract danger to ensure the effective implementation of recall of troops for national defense and to uphold the reservist recall system. Moreover, the court may, in deciding each individual case, take into account the circumstances in which the re-

servist violates his duty and decide an appropriate punishment to the extent permissible by law. Accordingly, we hold that the provisions at issue are not harsh legislation and are not contrary to the principle of proportionality laid down in Article 23 of the Constitution. With regard to the provision of Article 11, Paragraph 3, of the same Act that, where failure to report has made the order of recall undeliverable the case will be dealt with in the same manner as an attempt to evade the recall, it goes without saying that in applying this provision the elements required for imputation of the liability must not be disregarded.

That Article 10 of the Constitution allowing people the freedom of residence and migration is intended to protect the right of the people to decide of their own free will their place of residence, movement, and travel, including departure from and entry into the country has been explicated in our Interpretation No. 454. The Act Governing the Punishment of Offences Against Military Service, by Article 11, Paragraph 1, Subparagraph 3, im-

憲法第十條規定人民有居住遷徙之自由，旨在保障人民有自由設定住居所、遷徙、旅行，包括出境或入境之權利，業經本院釋字第四五四號解釋闡明在案。妨害兵役治罪條例第十一條第一項第三款僅就居住處所遷移，課予後備軍人依規定向相關機關為申報之義務，俾日後召集令得有效送達，並未限制其居住遷徙自由權利之行使，與憲法第十條之規定亦無牴觸。

poses upon reservists only the duty to report to the agency concerned as required to make the future orders of recall effectively deliverable, rather than placing any restriction on the exercise of their right of free choice of location of residence or movement, and is therefore not in conflict with Article 10 of the Constitution.

Justice Jyun-Hsiung Su filed dissenting opinion in part.

本號解釋蘇大法官俊雄提出部分不同意見書。

J. Y. Interpretation No.518（December 7, 2000）*

ISSUE: Is the provision of the Organic Regulation of the Irrigation Association of the Taiwan Province, providing that members of the water conservancy group should bear the cost of water control, in violation of Constitution?

RELEVANT LAWS:

Articles 15 and 23 of the Constitution（憲法第十五條、第二十三條）; Articles 24, 31 and 33 of the Organic Regulation of the Irrigation Association of the Taiwan Province (Dec. 24, 1998)（八十七年十二月二十四日臺灣省農田水利會組織規程第二十四條、第三十一條、第三十三條）; Articles 14, 15, 22, 25, 26, 27 and 28 of the Organic Act of the Irrigation Association (May 17, 1990)（農田水利會組織通則第十四條、第十五條、第二十二條、第二十五條、第二十六條、第二十七條、第二十八條）; Articles 24, 31 and 33 of the Organic Regulation of the Irrigation Association of the Taiwan Province (Jan. 31, 1986)（七十五年一月三十一日臺灣省農田水利會組織規程第二十四條、第三十一條、第三十三條）; Article 29 of the Organic Regulation of the Irrigation Association of the Taiwan Province (May. 27, 1995)（八十四年五月二十七日臺灣省農田水利會組織規程第二十九條）.

KEYWORDS:

property rights（財產權）, *Verhltinsmig keitsprinzip*

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* Translated by Fan, Chien-Te.

** Contents within frame, not part of the original text, are added for reference purpose only.

(principle of proportionality)（比例原則）, Irrigation Association（農田水利會）, public legal person（公法人）, public legal relationship（公法關係）, public welfare（公共利益）, long established custom（慣行）, irrigation group（水利小組）, water management fee（掌水費）, annual maintenance fees of minor water inlets or outlets（小給（排）水路養護歲修費）, private legal relationship（私權關係）.**

HOLDING: The Irrigation Associations are public legal persons. All lessees or emphyteuis owners of state owned or private cultivated lands, owners or right-of-dien owners of private cultivated lands, and representatives or beneficiaries of state owned cultivated lands in the region should be members of the Irrigation Association of that region, according to Article 14 of the Organic Act of the Irrigation Association. The public legal person of the Irrigation Association, legally equivalent to the legal person [entity] of local self-government, is empowered by the law with autonomy. Paragraph 1 of Article 15 of the same law states, "The members in the region of the irrigation association have the right to utilize water

解釋文：農田水利會為公法人，凡在農田水利會事業區域內公有、私有耕地之承租人、永佃權人，私有耕地之所有權人、典權人或公有耕地之管理機關或使用機關之代表人或其他受益人，依農田水利會組織通則第十四條規定，均為當然之會員，其法律上之性質，與地方自治團體相當，在法律授權範圍內，享有自治之權限。同通則第十五條第一項規定：會員在各該農田水利會內，有享有水利設施及其他依法令或該會章程規定之權利，並負擔繳納會費及其他依法令或該會章程應盡之義務。第二十二條又規定：農田水利會之組織、編制、會務委員會之召開與其議事程序、各級職員之任用、待遇及管理等事項，除本通則已有規定外，由省（市）主管機關擬訂，報請中央主管機

conservancy facilities and other rights defined by the law, and are obliged to pay membership dues and other obligations defined by the law. Article 22 of the same law states, “the organization or authorized size of the irrigation association, rules of convention and debate for the committees in the association, assignment, treatment of staff, management of the association, unless otherwise stipulated in this law, shall be proposed by the provincial government and approved by the responsible agency of the Central Government.” This is to increase public benefit, in accordance with the purpose of empowerment of law, and shall not be incompatible with Article 15, protection of property rights, or Article 23, limits to basic rights, of the Constitution. The sharing, managing and use of water management fees or maintenance fees for minor water inlets or outlets have been agreed upon by the group members as mutual aid to each other and are in the nature of private contracts, according to long established custom. Remedies should be sought according to civil litigation procedures in case of disputes. Paragraph 2 of Article 31 of the amended Organic Regu-

關核定之，係為增進公共利益所必要，且符合法律授權之意旨，與憲法第十五條財產權保障及第二十三條基本權利限制之規定，並無牴觸。惟農田水利會所屬水利小組成員間之掌水費及小給水路、小排水路之養護歲修費，其分擔、管理與使用，基於台灣農田水利事業長久以來之慣行，係由各該小組成員，以互助之方式為之，並自行管理使用及決定費用之分擔，適用關於私權關係之原理，如有爭執自應循民事訴訟程序解決。因此，中華民國七十五年一月三十一日修正發布之台灣省農田水利會組織規程第三十一條第二項雖規定掌水費用由小組會員負擔，第三十三條亦規定小給水路及小排水路之養護、歲修，由水利會儘量編列預算支應，不足部分得由受益會員出工或負擔，要屬前項慣行之確認而已，並未變更其屬性，與憲法保障財產權之意旨無違。

lation of the Irrigation Association of Taiwan (Jan 31, 1986) states that "water management fees should be shared among the members; maintenance fees should be budgeted by the irrigation association as much as possible, and the remaining part may be shared among the members." This only affirmed the long established custom without changing its nature, and thus should not be incompatible with the constitutional intent to protect property rights.

REASONING: The Irrigation Associations are public legal persons empowered by the law to pursue water conservancy for the state. According to Article 14 of the Organic Act of the Irrigation Association, all lessees or emphyteuis owners of state owned or private cultivated lands, owners or right-of-dien owners of private cultivated lands, and representatives or beneficiaries of state owned cultivated lands in the region should be members of the Irrigation Association of that region. Paragraph 1 of Article 15 of the same law states, "The members in the region of the irrigation association have the right to utilize water conservancy fa-

解釋理由書：農田水利會係秉承國家推行農田水利事業之宗旨，由法律賦與其興辦、改善、保養暨管理農田水利事業而設立之公法人。依農田水利會組織通則第十四條規定，凡在農田水利會事業區域內公有、私有耕地之承租人、永佃權人，私有耕地之所有權人、典權人或公有耕地之管理機關或使用機關之代表人或其他受益人均為當然之會員。其法律上之性質，與地方自治團體相當，在法律授權範圍內，享有自治之權限。同通則第十五條第一項規定：會員在各該農田水利會內，有享有水利設施及其他依法令或該會章程規定之權利，並負擔繳納會費及其他依法令或該會章程應盡之義務。第二十二條又規

cilities and other rights defined by the law, and are obliged to pay membership dues and other obligations defined by the law. Article 22 of the same law states, "The organization or authorized size of the irrigation association, rules of convention and debate for the committees in the association, assignment, treatment of staff, management of the association, unless otherwise stipulated in this law, shall be proposed by the provincial government and approved by the responsible agency of the Central Government." This is to increase public benefit, in accordance with the purpose of empowerment of law, and shall not be incompatible with Article 15, protection of property rights, or Article 23, limits to basic rights, of the Constitution.

定：農田水利會之組織、編制、會務委員會之召開與其議事程序、各級職員之任用、待遇及管理等事項，除本通則已有規定外，由省（市）主管機關擬訂，報請中央主管機關核定之，係為增進公共利益所必要，且符合法律授權之意旨，與憲法第十五條財產權保障及第二十三條基本權利限制之規定，並無牴觸。

According to long established custom, there are water conservancy groups under the irrigation associations. Each water conservancy group covers an irrigation area of 51 to 150 hectares, in the light of the ditches between the fields. A huge watering area might be split into two sections while small areas might be com-

台灣農田水利事業基於長久之慣行，設有水利小組，該水利小組係由灌溉面積五十一公頃以上一百五十公頃以下範圍，以埤圳為單位所組成，埤圳之灌溉面積較大者，得按支分線分設二個以上水利小組，區域過小者，得合併鄰近區域聯合設置之（七十五年一月三十一日修正發布之台灣省農田水利會組織

bined to form one section. (See Paragraph 1 of Article 24 of the Organic Regulation of the Irrigation Association of Taiwan (Jan. 31, 1986). Water conservancy facilities within a group covering area are called minor water inlets or outlets. Conservancy facilities outside of or connecting with a group covering area are overseen by the irrigation association. Considering the widespread area of the fields, limited water resources, and size differences among fields, to ensure the efficiency and effectiveness of irrigation, the management and maintenance of water inlets and outlets are overseen by the group itself, with group members helping each other with labor or fees. The fees are decided among the group members and then the irrigation association is entrusted with the collection for the group's disposal. Thereupon, the sharing, managing and use of water management fees or maintenance fees for minor water inlets or outlets according to the custom, has the nature of private contracts. (See Letter N.L. No. 87146255 of Oct. 19, 1998, from the Council for Agricultural Affairs, Executive Yuan) Remedies should be sought

規程第二十四條第一項參照），在此範圍內之灌溉系統稱為小給水路及小排水路，小給水路、小排水路以上之灌溉系統由農田水利會負責掌管；小給水路、小排水路以下之灌溉系統，因區域遼闊，水源有限，各會員耕作面積互有差等，為有效分配灌溉用水，維持灌溉用水秩序暨維護、修補與管理小給水路、小排水路等事務，向由水利小組之會員自行組成互助性之組織，以出工（自行擔負水利小組分配灌溉用水暨水路維修等工作）或出資方式自行處理，其由會員出資者，其負擔之額度，亦由水利小組會員自行議決後委由農田水利會代收並交由各該小組管理、支用。從而農田水利會所屬水利小組成員間之掌水費及小給水路、小排水路之養護歲修費，其分擔、管理與使用，基於慣行（參見行政院農業委員會八十七年十月十九日（八七）農林字第八七一四六二五五號函），係適用關於私權關係之原理，如有爭執自應循民事訴訟程序解決。此與農田水利會組織通則第二十五條至第二十八條所規定農田水利會應向會員徵收之會費、工程費、建造物使用費及餘水使用費等公法上之負擔並不相同，依八十四年五月二十七日修正發布之臺灣省農田水利會組織規程第二十九條規定，

according to civil litigation procedures in case of disputes. The above fees are different to those obligations under the public laws, such as membership fees, constructing fees and construction or water utilization fees. Article 29 of the Organic Regulation of the Irrigation Association of Taiwan (Jan. 31, 1986) states that, "(Groups) may entrust the irrigation association with the collection of the fees regarding water management and maintenance of water inlets and outlets". This clearly shows the private nature of the legal relationship among the group members under private contract. Budgeting by the irrigation association to subsidize the fees does not change the nature. Therefore, the provision of Paragraph 2 of Article 31 of the Organic Regulation of the Irrigation Association of Taiwan (amended to be Paragraph 2 of Article 26 on May 27, 1995) that group members share the water management fees, and the provision of Article 32 (amended to be Paragraph 2 of Article 28) that theremaining part of the maintenance fees of minor water inlets and outlets should be shared by group members while the irriga-

掌水費及小給水路、小排水路養護、歲修之費用，得委託水利會代收，尤足證明其係水利小組成員因適用私權關係之原理所成立之權利義務關係，縱經農田水利會編列專款補助，以減輕農田水利會會員之負擔，亦不因此而變更此一屬性。故台灣省農田水利會組織規程第三十一條第二項（八十四年五月二十七日修正為第二十六條第二項）雖規定掌水費用由小組會員負擔，第三十三條亦規定小給水路及小排水路之養、歲修，由水利會儘量編列預算支應，不足部分得由受益會員出工或負擔（八十四年五月二十七日修正為第二十八條第二項），要屬前開慣行之確認而已，與憲法保障財產權之意旨無違。

tion association should budget as much as possible to relieve the farmers' burden, only affirmed the long established custom, and should not be incompatible with the constitutional intent to protect property rights.

As long as the irrigation associations are public legal persons, their legal relationship to their members is a public legal relationship. Moreover, the control of water discharge or flow and maintenance of water passages both need the involvement of the governmental authority. As irrigation associations are public legal persons by law, and the administrative litigation system has been improved, it is important to decide whether the long established custom of private legal relationship should be preserved, or that the water management and maintenance should be defined as obligations under public laws. Furthermore, No. 3 of the Outlines of the Irrigation Group Meeting Rules of the Chia Nan Irrigation Association state, "meetings should not be held without at least half of the members in attendance," but this is not applicable if two or three

農田水利會既為公法人，其與會員間之權利義務，應屬公法關係，且控制水量及分配灌溉用水，乃至於給水路之維護、修補與管理，要皆具有公權力行使之性質，在農田水利會已由法律明定其為公法人，且於行政訴訟制度已全面變革之後，是否仍應循其長久之慣行而保留適用關於私權關係之原理，抑或應將由會員負擔之掌水費暨小給水路、小排水路養護、歲修費，歸屬為公法上之負擔而以法律明定，均應予以檢討。再者，台灣省嘉南農田水利會水利小組會議要點第三點規定：水利小組會議出席人數非有應出席會員二分之一以上之出席不得開會，但同一案件召集二次以上（包括二次）仍未達二分之一時，不在此限；第六點規定：水利小組會議應於開會三日前，於重要據點辦理公告通知會員，並開會當日利用基層組織或廣播方式，督促會員參加。係關於水利小組會議最低出席人數之限制及督促會員

meetings are called for the same issue. No. 6 of the said rules state, “3 days advance notice should be given to members for irrigation group meetings, and on the day of the meeting, measures such as broadcasts should be taken to urge members to attend the meeting.” The issues related to the number of attendees or measures to urge members to attend, are subject to constitutional democratic principles, and ought to follow the democratic principle of decision by majority. Nevertheless, the nature of what the Outlines provide is not categorized as laws or regulations as defined in the Constitutional Interpretation Procedure Act, and thus the Outlines are not subject to our interpretation.

參加該項會議之方法，在憲法之民主政治原則下，各種團體內部意見之形成，固應遵守多數決之原則，惟該要點規定之事項，在性質上仍非司法院大法官審理案件法所稱之法律或命令，不得作為解釋之對象，併此指明。

Justice Jyun-Hsiung Su filed dissenting opinion.

本號解釋蘇大法官俊雄提出不同意見書。

J. Y. Interpretation No.519（December 22, 2000）*

ISSUE: The MOF directive states that the export enterprises inside duty-free export processing zones, enterprises inside the Science-based Industrial Park, or a bonded factory or bonded warehouse supervised by Customs, which sell goods within domestic tax zones and in accordance with relevant regulations, need not make customs declaration, but shall issue uniform invoices and pay business taxes. Does the said directive conflict with the Business Tax Act, thus violating Article 19 of the Constitution?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; Articles 1, 2, 5, Subparagraph 2, 35 and 41, Paragraph 2 of the Business Tax Act（營業稅法第一條、第二條、第五條第二款、第三十五條、第四十一條第二項）.

KEYWORDS:

duty free export processing zones（免稅出口區）, Science-based Industrial Park（科學工業園區）, bonded factory or bonded warehouse supervised by Customs（海關管理之保稅工廠或保稅倉庫）, customs declaration（報關）.**

HOLDING: The letter Ref. No. Taiwan-Finance-Tax-7623300 issued by

解釋文：財政部中華民國七十六年八月三十一日台財稅字第七六二三

* Translated by Dr. C.Y. Huang of Tsar & Tsai Law Firm.

** Contents within frame, not part of the original text, are added for reference purpose only.

the Ministry of Finance (MOF) on August 31, 1987, states: "Export enterprises inside duty-free export processing zones, enterprises inside the Science-based Industrial Park, or a bonded factory or bonded warehouse supervised by Customs, that sell(s) goods within domestic tax zones and in accordance with relevant regulations need not make customs declaration, but shall issue uniform invoices, and report and pay business tax according to Article 35 of the Business Tax Act." This is a technical supplementary regulation regarding business tax collection by the competent authority on the basis of its legal duty and responsibility, so as to prevent the duty-free-zone businesses from tax evasion by selling non-bonded goods, which do not require customs declaration, within domestic tax zones. The aforesaid is different from the exemption from business tax for the import of goods as referred to in Article 5, Subparagraph 2, of the Business Tax Act and the goods imported for business purposes as referred to in the first sentence of Paragraph 2 of Article 41 of the said Act. It fulfills the purpose of the Business Tax Act and does

三〇〇號函釋所稱：「免稅出口區內之外銷事業、科學工業園區內之園區事業、海關管理之保稅工廠或保稅倉庫，銷售貨物至國內課稅區，其依有關規定無須報關者，應由銷售貨物之營業人開立統一發票，並依營業稅法第三十五條之規定報繳營業稅」，係主管機關基於法定職權，為執行營業稅法關於營業稅之課徵，避免保稅區事業銷售無須報關之非保稅貨物至國內課稅區時逃漏稅捐而為之技術性補充規定，此與營業稅法第五條第二款所稱進口及第四十一條第二項前段對於進口供營業用之貨物，於進口時免徵營業稅均屬有間，符合營業稅法之意旨，尚未違背租稅法定主義，與憲法第十九條及營業稅法第二條、第五條第二款、第四十一條第一項前段規定均無牴觸。

not contradict the principle of taxation by law, Article 19 of the Constitution, Article 2, Article 5, Subparagraph 2, or Article 41, Paragraph 1, first sentence, of the Business Tax Act.

REASONING: Article 19 of the Constitution stipulates: "The people shall have the duty of paying tax in accordance with the law." Accordingly, any tax should have a legal base. However, it is impossible to specify all the details in the law. For technical and detail matters, necessary interpretation, within the scope of the purpose of the law concerned, is made per administrative order.

解釋理由書：憲法第十九條規定，人民有依法律納稅之義務。故任何稅捐之課徵，均應有法律之依據。惟法律之規定不能鉅細靡遺，有關課稅之技術性及細節性事項，於符合法律意旨之限度內，尚非不得以行政命令為必要之釋示。

Article 1 of the Business Tax Act provides: "Business tax shall be levied in accordance with this Act on the sale of goods or services within the territory of the Republic of China (R.O.C.) and the import of goods." Under the proviso in Subparagraph 1 of Article 5 of the said Act, the goods imported to the export enterprises inside duty-free export processing zones, enterprises inside the Science-based Industrial Park, or a bonded factory

營業稅法第一條規定，在中華民國境內銷售貨物或勞務及進口貨物，均應依本法規定課徵營業稅。依同法第五條第一款但書之規定，貨物自國外進入政府核定之免稅出口區內之外銷事業、科學工業園區內之園區事業及海關管理之保稅工廠或保稅倉庫者，非屬進口。該項貨物乃由海關列為保稅貨物，尚無須依關稅法及營業稅法等相關規定完納有關稅捐。即凡進入政府核定之免稅出口區內之外銷事業、科學工業園區內之

or bonded warehouse supervised by Customs are not categorized as imports. The aforesaid goods are listed by the Customs as bonded goods, exempt from duties imposed under the Customs Act and the Business Tax Act. The reason why the goods imported to the export enterprises inside duty-free export processing zones, enterprises inside the Science-based Industrial Park, or a bonded factory or bonded warehouse supervised by Customs are exempt from business tax is because of the precondition that bonded goods are stored in bonded areas and that the original goods must be processed for re-exportation. If the export enterprises inside duty-free export processing zones and other aforesaid enterprises sell bonded goods to other domestic areas, customs declaration procedure must be completed because relevant duties on such goods have yet to be paid. Hence, Subparagraph 2 of Article 5 of the Business Tax Act provides that at this point, such goods shall be deemed as imports, for which the importer should complete the customs declaration procedure in accordance with the law and pay the duties

園區事業及海關管理之保稅工廠或保稅倉庫之進口貨物，其所以免徵營業稅者，係以保稅貨物存放於保稅區域內，且必須將原貨加工後再行出口為要件。若該貨物由免稅出口區之外銷事業等銷售至國內其他地區時，因屬尚未繳納有關稅捐之保稅貨物，須向海關辦理報關手續，故第五條第二款乃規定此時為「進口」，並由進口人依法報關，繳納有關稅捐。其無須報關者，則已非屬營業稅法第五條第二款所規定進口之範圍，而與一般營業人在國內銷售貨物之行為相同，此與營業稅法第四十一條第二項前段對於進口供營業用之貨物，於進口時免徵營業稅有間，自應依法開立統一發票並報繳營業稅。財政部中華民國七十六年八月三十一日台財稅字第七六二三三〇〇號函釋所稱：「免稅出口區內之外銷事業、科學工業園區內之園區事業、海關管理之保稅工廠或保稅倉庫，銷售貨物至國內課稅區，其依有關規定無須報關者，應由銷售貨物之營業人開立統一發票，並依營業稅法第三十五條之規定報繳營業稅。」係主管機關基於法定職權，為執行營業稅法關於營業稅之課徵，避免保稅區事業銷售無須報關之非保稅貨物至國內課稅區時逃漏稅捐而為之技術性補充規定，符合前述

concerned. Import exempted from customs declaration is outside the scope of import as prescribed in Subparagraph 2 of Article 5 of the Business Tax Act, and is the same as the act of general business operators selling goods locally. This is different from the goods imported by business entities for business operation purposes, which are exempted from business tax upon importation, and therefore a uniform invoice should be issued and business tax should be paid. The letter Ref. No. Taiwan-Finance-Tax-7623300 issued by the Ministry of Finance (MOF) on August 31, 1987, states: "Export enterprises inside duty-free export processing zones, enterprises inside the Science-based Industrial Park, or a bonded factory or bonded warehouse supervised by Customs, that sell(s) goods within domestic tax zones and in accordance with relevant regulations need not make customs declaration, but shall issue uniform invoices, and report and pay business tax according to Article 35 of the Business Tax Act." This is a technical supplementary regulation regarding business tax collection by the competent authority on the basis of its

營業稅法之意旨，尚未違背租稅法定主義，與憲法第十九條及營業稅法第二條、第五條第二款、第四十一條第一項前段規定均無牴觸。

legal duty and responsibility, so as to prevent the duty-free-zone businesses from tax evasion by selling non-bonded goods, which do not require customs declaration, within domestic tax zones. The aforesaid fulfills the purpose of the Business Tax Act, does not contradict the principle of taxation by law, Article 19 of the Constitution, Article 2, Article 5, Subparagraph 2, or Article 41, Paragraph 1, first sentence, of the Business Tax Act.

With regard to the term "to issue uniform receipts" referred to in the letter Ref. No. Park-Tou-6318 issued by the Science-based Industrial Park Administration on June 12, 1986, as mentioned by the petitioner, it is merely for the purpose of successful collection of the monthly administrative fee and for the convenience of subsequent auditing processes. The letter was an internal notification issued by the administrative body, not a regulatory order authorized by the law. Furthermore, the said Administration is not the competent authority in charge of tax collection, and is not authorized to interpret or change tax rules. There should be no conflict between

至聲請人所提科學園區管理局七十五年六月十二日園投字第六三一八號函所稱「開立統一收據」部分，僅為期按月順利徵收管理費及便利事後稽核工作之進行，為管理之內部通知，該函非屬經法律授權訂定之法規命令，且該局亦非稅捐稽徵主管機關，並無解釋或變更稅捐法令之權，應無所謂與上開財政部函示競合之問題，併此指明。

the said letter and the aforementioned MOF letter. This is hereby also clarified.

J. Y. Interpretation No.520（January 15, 2001）*

ISSUE: Where a statutory bill drafted for the construction of the 4th nuclear power plant had been passed and upon the request of the Executive Yuan, reconsidered by the Legislative Yuan in accordance with the Constitution, may it still be constitutionally permissible for the Executive Yuan to withhold implementation of the said statutory bill in its discretion or based upon change of administration?

RELEVANT LAWS:

Articles 57, 58, 63 and 70 of the Constitution（憲法第五十七條、第五十八條、第六十三條、第七十條）; Article 3 of the Amendment of the Constitution（憲法增修條文第三條）; Articles 16 and 17 of the Legislative Yuan Functioning Act（立法院職權行使法第十六條、第十七條）; Articles 5, Paragraph 1, Subparagraph 1, and 7 of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第五條第一項第一款、第七條）; Articles 6, 7, 8, 61 and 62 of the Budget Act（預算法第六條、第七條、第八條、第六十一條、第六十二條）; Item 4, Section 2, of the Operation Guidelines on the Examination, Reward, and Discipline Concerning the Execution of Planned Budgets by the Executive Yuan and All of Its Affiliated Agencies（行政院暨所屬各機

* Translated and edited by Professor Andy Y. Sun. Except as indicated otherwise, all notes are added by the translator.

** Contents within frame, not part of the original text, are added for reference purpose only.

關計畫預算執行考核獎懲作業要點第四點第二款）.

KEYWORDS:

budgetary bill（預算案）, Executive Yuan（行政院）, expenditure（支出）, flexibility of budget execution（執行預算之彈性）, individualized law（個別性法律）, Legislative Yuan（立法院）, parliamentary power of decision-making participation（國會參與決策權）, revenue（歲入）, statutory budget（法定預算）, withholding（停止執行）, *massnahmegesetz* or law of measures（措施性法律）.**

HOLDING: The statutory budget is a budgetary bill that has gone through the resolution and promulgation process of the Legislative Yuan, and is comparable in form to a statute. In J. Y. Interpretation No. 391, [this Yuan] referred to it as law of measures *(Massnahmegesetz)* in light of its differences from an ordinary statutory bill in terms of contents, regulatory target, and resolution process. Whether it is constitutional or lawful for an [administrative] agency charged with administering the budget to withhold a portion of the designated expenditure in that budget in its discretion should depend upon the circumstances.

解釋文：預算案經立法院通過及公布手續為法定預算，其形式上與法律相當，因其內容、規範對象及審議方式與一般法律案不同，本院釋字第三九一號解釋曾引學術名詞稱之為措施性法律。主管機關依職權停止法定預算中部分支出項目之執行，是否當然構成違憲或違法，應分別情況而定。諸如維持法定機關正常運作及其執行法定職務之經費，倘停止執行致影響機關存續者，即非法之所許；若非屬國家重要政策之變更且符合預算法所定要件，主管機關依其合義務之裁量，自得裁減經費或變動執行。至於因施政方針或重要政策變更涉及法定預算之停止執行時，則應本行政院對立法院負責之憲法意旨暨尊重立

For funds designated for the maintenance of an agency's normal operations and carrying out its legally authorized duties, such a withholding is not permitted by law if it should affect the existence of that agency; for withholding that meets the conditions under the Budget Act and does not involve adjustment of a critical national policy, the authorized agency may, in its discretion that fits the duties of that agency, reduce the budgetary expenses or adjust the implementation of a [given] budget. With regard to a major policy change that involves the withholding of a statutory budget, based upon the constitutional purpose that the Executive Yuan shall be responsible to the Legislative Yuan, and in respect of the right of the Legislative Yuan to participate in the decision- making process regarding critical national issues, in accordance with Article 3 of the Amendment of the Constitution and Article 17 of the Legislative Yuan Functioning Act, the Premier or related ministers of the Executive Yuan shall within reasonable time submit a report to the Legislative Yuan and subject [themselves] to interpellation. In light of its effect

法院對國家重要事項之參與決策權，依照憲法增修條文第三條及立法院職權行使法第十七條規定，由行政院院長或有關部會首長適時向立法院提出報告並備質詢。本件經行政院會議決議停止執行之法定預算項目，基於其對儲備能源、環境生態、產業關連之影響，並考量歷次決策過程以及一旦停止執行善後處理之複雜性，自屬國家重要政策之變更，仍須儘速補行上開程序。其由行政院提議為上述報告者，立法院有聽取之義務。行政院提出前述報告後，其政策變更若獲得多數立法委員之支持，先前停止相關預算之執行，即可貫徹實施。倘立法院作成反對或其他決議，則應視決議之內容，由各有關機關依本解釋意旨，協商解決方案或根據憲法現有機制選擇適當途徑解決僵局，併此指明。

fect on energy reserves, the environment, and related industries, and in consideration of its past policy-forming process as well as the complexity in the disposition of the aftermath in the event such withholding should indeed be carried out, the present statutory budget item that the Executive Yuan meeting resolved to withhold is indeed a change of a critical national policy that the above procedural requirement must be met as soon as possible.[1] Having received the above report from the Executive Yuan, the Legislative Yuan is obligated to listen [to it]. The Executive Yuan, having submitted the above report, may carry on the previous budget withholding if and when such policy change acquires support from the majority of members of the Legislative Yuan. It should also be pointed out that if the Legislative Yuan should decide to oppose or form other resolutions, depending upon the contents of the resolution, all related

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[1] This is in reference to the resolution out of the 2,706th Meeting of the Executive Yuan (full Cabinet meeting), held on October 25, 2000. This resolution was meant to carry out the campaign platform of the Democratic Progressive Party, then fresh from acquiring the presidential and executive power after 55 years of consecutive rule by the Kuomintang (KMT, or the Nationalist Party) and in response to a re-evaluation Report on the Construction Project of the Fourth Nuclear Power Plant, commissioned by the Ministry of Economic Affairs.

agencies should then negotiate a solution based upon the meanings and purpose of this Interpretation, or to select a proper channel within the current constitutional mechanism to end the stalemate.

REASONING: This petition for interpretation derives from the Executive Yuan's decision to halt the construction of the fourth nuclear power plant and withhold its related budget, which resulted in a constitutional dispute with the Legislative Yuan over the exercise of its duties and a different interpretation of the same law by the Legislative Yuan. On the part of constitutional interpretation, [this petition] should be granted since it is in conformity with Article 5, Paragraph 1, Subparagraph 1, of the Constitutional Interpretation Procedure Act in that one central [government] agency is in dispute with another [central government] agency on the application of the Constitution in exercising its functions and duties; on the part of uniform interpretation [of laws], the petition does not specify which provision[s] of the Budget Act applied by the legislative agency it differs with, which is not in con-

解釋理由書：本件行政院為決議停止興建核能第四電廠並停止執行相關預算，適用憲法發生疑義，並與立法院行使職權，發生適用憲法之爭議，及與立法院適用同一法律之見解有異，聲請解釋。關於解釋憲法部分，與司法院大法官審理案件法第五條第一項第一款中段中央機關因行使職權與其他機關之職權，發生適用憲法之爭議規定相符，應予受理；關於統一解釋部分，聲請意旨並未具體指明適用預算法何項條文與立法機關適用同一法律見解有異，與上開審理案件法第七條第一項第一款所定聲請要件尚有未合，惟此部分與已受理之憲法解釋係基於同一事實關係，不另為不受理之決議。又本件係就行政院停止執行法定預算與立法院發生適用憲法之爭議，至引發爭議之電力供應究以核能抑或其他能源為優，已屬能源政策之專業判斷問題，不應由行使司法權之釋憲機關予以裁決，不在解釋範圍，均合先敘明。

formity with Article 7, Paragraph 1, Subparagraph 1, of the abovementioned Interpretation Procedure Act. Yet no denial is issued since this part [of the petition] is based on the same facts as the part for constitutional interpretation. Furthermore, it must be pointed out that this petition concerns the controversy over the Executive Yuan's exercise of the statutory budget to that of the Legislative Yuan's application of the Constitution. It is not within the scope of this interpretation to deal with the underlying cause of the dispute, that is, whether nuclear-generated electricity is superior to other sources of supply, which as such belongs to the professional judgment in [laying out] the energy policy; nor should it be rendered by the constitutional interpretation agency in exercising its judicial authority.

The budgetary system is a constitutional mechanism by which the executive branch realizes its policy goals, with the participation of the legislative branch. The legislature has the power and duty to review, resolve and supervise the execution of the budget. The statutory budget is a

預算制度乃行政部門實現其施政方針並經立法部門參與決策之憲法建制，對預算之審議及執行之監督，屬立法機關之權限與職責。預算案經立法院審議通過及公布為法定預算，形式與法律案相當，因其內容、規範對象及審議方式與法律案不同，本院釋字第三九一

budgetary bill that has gone through the resolution and promulgation process of the Legislative Yuan, and is comparable in form to a statute. That is why in [this Yuan], it is referred to as law of measures *(Massnahmegesetz)* in light of its differences from an ordinary statutory bill in terms of contents, regulatory target, and resolution process. While the execution of both the statutory budget and the statute [itself] belongs to the Executive Branch, the differences are: [For] a law that provides the authority for an administrative agency, a certain legal effect takes place as long as all conditions laid out [in that law] are met. If the law itself does not provide or authorize any discretion in rendering a policy decision or options, the authorized agency is obligated to act in [full] compliance with what that law mandates. [On the other hand,] the statutory budget passed by the Legislative Yuan is considered an authorizing regulation concerning the annual expenditure, revenue and future commitment of national agencies (See Articles 6 to 8 of the Budget Act), with its effect being the setting of the maximum cost and purpose of ex-

號解釋曾引用學術名詞稱之為措施性法律，其故在此。法定預算及行政法規之執行，均屬行政部門之職責，其間區別在於：賦予行政機關執行權限之法規，其所規定之構成要件具備，即產生一定之法律效果，若法律本身無決策裁量或選擇裁量之授權，該管機關即有義務為符合該當法律效果之行為；立法院通過之法定預算屬於對國家機關歲出、歲入及未來承諾之授權規範（參照預算法第六條至第八條），其規範效力在於設定預算執行機關得動支之上限額度與動支目的、課予執行機關必須遵循預算法規定之會計與執行程序、並受決算程序及審計機關之監督。關於歲入之執行仍須依據各種稅法、公共債務法等相關規定，始有實現可能。而歲出法定預算之停止執行，是否當然構成違憲或違法，應分別情形而定，在未涉及國家重要政策變更且符合預算法所定條件，諸如發生特殊事故、私經濟行政因經營策略或市場因素而改變等情形，主管機關依其合義務之裁量，則尚非不得裁減經費或變動執行，是為所謂執行預算之彈性。

pense items, regulation of the accounting and enforcement procedures that the authorized agencies must abide by in accordance with the Budget Act, as well as supervision from the final accounting procedure and auditing agencies. With regard to the execution of revenues, various taxes, public bonds and related laws and regulations should be followed before it can be realized. Whether withholding of [certain] annual expenditures automatically constitutes a violation of the law or Constitution should depend upon the circumstances. For withholding that does not involve the adjustment of a critical national policy and meets the conditions under the Budget Act, such as the occurrence of special incidents or private economic administration changes due to management strategy or market factors, the authorized agency may, in its discretion according to the duties of that agency, reduce the budgetary expenses or adjust the implementation of a [given] budget. This is the so-called "flexibility of budget execution."

For funds under the statutory budget 法定預算中維持法定機關正常運

designated for the maintenance of an agency's normal operations and exercising its legally authorized duties, since the withholding of those funds would affect the existence of that agency, the law does not permit [the spending] to be left to the administrative agency's random discretion. For withholding of statutory budget [funds] that has the functional effect of changing administrative or critical national policies, it is contrary to the constitutional purpose of having the Legislative Yuan participate in the decision-making process of critical national issues if such withholding does not indeed involve the Legislative Yuan's participation. Hence, the abovementioned flexibility of budget execution does not mean that an authorized administrative agency may pick and choose items by itself in administering [the budget] without regard to the fact that the statutory budget is one that is passed by the Legislative Yuan and has the effect of a mandatory statute. Under the Budget Act, the status of appropriation and distribution of annual expenditures must be reviewed period-by-period and level-by-level, and the review reports must be

作及履行其法定職務之經費，因停止執行致影響機關之存續，若仍任由主管機關裁量，即非法之所許。其因法定預算之停止執行具有變更施政方針或重要政策之作用者，如停止執行之過程未經立法院參與，亦與立法部門參與決策之憲法意旨不符。故前述執行法定預算之彈性，並非謂行政機關得自行選擇執行之項目，而無須顧及法定預算乃經立法院通過具備規範效力之事實。預算法規中有關執行歲出分配預算應分期逐級考核執行狀況並將考核報告送立法院備查（參照預算法第六十一條），執行預算時各機關、各政事及計畫或業務科目間經費流用之明文禁止（參照同法第六十二條），又各機關執行計畫預算未達全年度百分之九十者，相關主管人員依規定議處（參照中華民國八十九年八月三日行政院修正發布之行政院暨所屬各機關計畫預算執行考核獎懲作業要點第四點第二款），凡此均屬監督執行預算之機制，貫徹財政紀律之要求。本院釋字第三九一號解釋係針對預算案之審議方式作成解釋，雖曾論列預算案與法律案性質之不同，並未否定法定預算之拘束力，僅闡明立法機關通過之預算案拘束對象非一般人民而為國家機關，若據釋字第三九一號解釋而謂行政機關不問支

submitted to the Legislative Yuan for further examination (Article 61); there is an express prohibition against commingling of funds among individual agencies, divisions, projects or budgetary items in administering the budget (see Article 62); moreover, the supervising personnel shall be subject to disciplinary actions in accordance with the regulations if the discharging agency does not achieve 90% of the planned annual budget (See Item 4, Section 2, of the Operation Guidelines on the Examination, Reward, and Discipline Concerning the Execution of Planned Budgets by the Executive Yuan and All of Its Affiliated Agencies, promulgated by the Executive Yuan on August 3, 2000). All of these are monitoring mechanisms for administering the budget and the fulfillment of financial discipline. J. Y. Interpretation No. 391 was rendered with a focus on the review process of a budgetary bill. While it has indeed differentiated the nature between a statutory budget and a statutory [law], it did not negate the binding force of a statutory budget. [The Interpretation] only illustrated that the binding target of a budgetary bill passed

出之性質為何，均有權停止執行法定預算，理由並不充分。至預算法雖無停止執行法定預算之禁止明文，亦不得遽謂行政機關可任意不執行預算。矧憲法增修條文對憲法本文第五十七條行政院向立法院負責之規定雖有所修改，其第三條第二項第二款仍明定：「行政院對於立法院決議之法律案、預算案、條約案，如認為有窒礙難行時，得經總統之核可，於該決議案送達行政院十日內，移請立法院覆議。立法院對於行政院移請覆議案，應於送達十五日內作成決議。如為休會期間，立法院應於七日內自行集會，並於開議十五日內作成決議。覆議案逾期未決議者，原決議失效。覆議時，如經全體立法委員二分之一以上決議維持原案，行政院院長應即接受該決議。」從而行政院對立法院通過之預算案如認窒礙難行而不欲按其內容執行時，於預算案公布成為法定預算前，自應依上開憲法增修條文覆議程序處理。果如聲請機關所主張，執行法定預算屬於行政權之核心領域，行政機關執行與否有自由形成之空間，則遇有立法院通過之預算案不洽其意，縱有窒礙難行之情事，儘可俟其公布成為法定預算後不予執行或另作其他裁量即可，憲法何須有預算案覆議程序之設。

by the legislature is not the general public but national agencies. Thus, it is not sufficient to argue, that an administrative agency always has the authority [or power] to withhold the statutory budget without regard to the nature of the expenditure. While the Budget Act does not expressly prohibit withholding [of funds] in carrying out the statutory budget, it cannot be abruptly concluded that the administrative agency may arbitrarily decide not to administer the budget. Although the Amendment of the Constitution revised Article 57 of the Constitution concerning the fact that the Executive Yuan shall be responsible to the Legislative Yuan, Article 3, Paragraph 2, Subparagraph 2, nevertheless provides: "Should the Executive Yuan deem a statutory, budgetary, or treaty bill passed by the Legislative Yuan difficult to execute, the Executive Yuan may, with the approval of the President and within ten days of the bill's submission to the Executive Yuan, request the Legislative Yuan to reconsider the bill. The Legislative Yuan shall reach a resolution on the returned bill within fifteen days after it is received. Should the Legis-

lative Yuan be in recess, it shall convene of its own accord within seven days and reach a resolution within fifteen days after the session begins. Should the Legislative Yuan not reach a resolution within the said period of time, the original bill shall become invalid. Should more than one-half of the total number of Legislative Yuan members uphold the original bill, the President of the Executive Yuan shall immediately accept the said bill." It follows that if the Executive Yuan should consider a budgetary bill passed by the Legislative Yuan difficult and not intend to execute in accordance with its contents, it should indeed follow the above-indicated reconsideration process before a budgetary bill is promulgated to become a statutory budget. If the petition agency's argument is correct that carrying out the statutory budget is the core area of the executive power, and that there is room for the administrative agency to decide in its liberty whether to carry that out, then whenever a budgetary bill passed by the Legislative Yuan does not meet [the Executive Yuan's] satisfaction or there is difficulty in carrying it out, it can indeed

simply decide not to execute or exercise some other discretions, and there is no need for the installation of the reconsideration process regarding a budgetary bill under the Constitution.

In addition to specifying the concrete figures of the needed funding for the normal operations of national agencies and carrying out legally authorized duties, the budgetary bill also includes the necessary financial resources for the promotion of all kinds of policies. In accordance with modern financial economic theory, the budget [also] carries the function of guiding the economic development and affecting the cycles of prosperity. Under the system of representation through constitutional democracy, the legislature has the authority to review and resolve the budget. This is not only supervision, as the representative of public opinion, over the financial expenditures and relief of the citizens' taxation, but also the realization of national policies and formation of projects in carrying out those policies through the review of the budget, academically known as the parliamentary power of de-

預算案除以具體數字載明國家機關維持其正常運作及執行法定職掌所需之經費外，尚包括推行各種施政計畫所需之財政資源。且依現代財政經濟理論，預算負有導引經濟發展、影響景氣循環之功能。在代議民主之憲政制度下，立法機關所具有審議預算權限，不僅係以民意代表之立場監督財政支出、減輕國民賦稅負擔，抑且經由預算之審議，實現參與國家政策及施政計畫之形成，學理上稱為國會之參與決策權。本件所關核能電廠預算案通過之後，立法院於八十五年五月二十四日第三屆第一會期第十五次會議，亦係以變更行政院重要政策，依當時適用之憲法第五十七條第二款規定決議廢止核能電廠興建計畫，進行中之工程立即停工並停止動支預算，嗣行政院於同年六月十二日，亦以不同意重要政策變更而移請立法院覆議，可見基於本件核能電廠之興建對儲備能源、環境生態、產業關連之影響，並考量經費支出之龐大，以及一旦停止

cision-making participation. In the present petition, having [first] passed the related budget concerning the fourth nuclear power plant, the Third Legislative Yuan in its 15th Meeting of the First Session on May 24, 1996, and in accordance with the then applicable Article 57, Subparagraph 2, of the Constitution, resolved to change the Executive Yuan's critical policy by abolishing the construction scheme of the nuclear power plant. All [related] projects in progress had to be stopped immediately and thus could not take expenditure from the budget. Subsequently, the Executive Yuan, on the ground of disagreeing with [this] critical policy change, submitted [the resolution] to the Legislative Yuan for reconsideration on June 20 of the same year. It is apparent, therefore, that based upon the effect the construction of a nuclear power plant has on energy reserves, the environment, and related industries, together with the massive budget expenses and the complexity in the disposition of the aftermath in the event such withholding should be carried out, [the present withholding] should indeed be considered a change of a critical national

執行善後處理之複雜性，應認係屬國家重要政策之變更，即兩院代表到院陳述時對此亦無歧見。是本件所關核能電廠預算案自擬編、先前之停止執行，以迄再執行之覆議，既均經立法院參與或決議，則再次停止執行，立法機關自亦有參與或決議之相同機會。法定預算已涉及重要政策，其變動自與非屬國家重要政策變更之單純預算變動，顯然有別，尚不能以所謂法定預算為實質行政行為，認聲請機關有裁量餘地而逕予決定並下達實施，或援引其自行訂定未經送請立法機關審查之中央機關附屬單位預算執行要點核定停辦，相關機關立法院執此指摘為片面決策，即非全無理由。

policy, which was not disputed during the oral argument by representatives from either the Executive or Legislative Yuans. Consequently, since the Legislative Yuan participated in and resolved the budgetary bill concerning the construction of the nuclear power plant from its initiation, through its previous suspension or withholding, to reconsideration of the administration of [the budget], the Legislative Yuan should naturally be given the same opportunity to participate in or resolve the issue of further withholding [of funds]. Since this statutory budget touches upon a critical policy, its revision is obviously different from a simple adjustment of a budgetary item concerning non-critical national policies. Thus, the petitioning [administrative] agency does not have the discretionary leeway to decide and implement [the withholding] arbitrarily, on the ground that the so-called statutory budget is [in fact] a substantive administrative act, or [alternatively] relying on its self-imposed regulation, yet to be submitted to and reviewed by the Legislative Yuan, the Guidelines on the Execution of the Budget by the Central [Government]

Agencies and Their Affiliated Units. It is not without merits for the Related Institution, the Legislative Yuan, to consider this [argument] to be unilateral decision-making.[2]

Democratic governance is governance by public opinion. The path to realize the governance of public opinion is the election of the President and members of the Legislative Yuan as their terms expire. It is indeed a common occurrence in partisan politics that an elected presidential candidate seeks to promote what was promised during the campaign, so that the President, through his appointed Premier of the Executive Yuan, may change previously existing policies or orientation not [necessarily] consistent with his political views. Yet regardless of the change of ruling political party or reorganization of the Executive Yuan, any change of policy direction or critical policy should never-

民主政治為民意政治，總統或立法委員任期屆滿即應改選，乃實現民意政治之途徑。總統候選人於競選時提出政見，獲選民支持而當選，自得推行其競選時之承諾，從而總統經由其任命之行政院院長，變更先前存在，與其政見未洽之施政方針或政策，毋迺政黨政治之常態。惟無論執政黨更替或行政院改組，任何施政方針或重要政策之改變仍應遵循憲法秩序所賴以維繫之權力制衡設計，以及法律所定之相關程序。蓋基於法治國原則，縱令實質正當亦不可取代程序合法。憲法第五十七條即屬行政與立法兩權相互制衡之設計，其中同條第二款關於重要政策，立法院決議變更及行政院移請覆議之規定，雖經八十六年七月二十一日修正公布之憲法增修條

[2] The original Chinese text makes a subtle distinction between the term you-guan-ji-guan (有關機關) or you-guan-bu-hui (有關部會), in describing the related administrative agencies or departments in the Executive Branch, and the term xiang-guan-ji-guan (相關機關), or Related Institution, in describing the petitioner of this case, the Legislative Yuan (the Legislative Branch). Unless otherwise indicated (such as individual's Chinese names), the Chinese spelling is depicted by the pinyin system.

theless abide by the check and balance of powers upon which the constitutional order is based. Under the rule-of-law principle, even substantive appropriateness is no substitute for due process. Article 57 of the Constitution is designed for the check and balance of powers between the Executive and Legislative Yuans. The ruling on the Legislative Yuan's resolution to change, and the Executive Yuan's request for reconsideration of critical policy is provided in Subparagraph 2 of the same Article. Although the Amendment of the Constitution of July 21, 1997, [in effect] deleted this provision, with Article 3, Paragraph 2, Subparagraph 3, being added to create the system by which the Legislative Yuan may cast its no-confidence vote against the Premier, the rules on the Legislative Yuan's duties, as provided in Article 63 of the Constitution, remain intact. Therefore, Article 16 of the Legislative Yuan Functioning Act nevertheless provides regulations on the process by which the Executive Yuan may submit its report on the administration's policies and orientation. Article 17 provides: "With the occurrence of a major event or change of

文刪除，並於該第三條第二項第三款增設立法院對行政院院長不信任投票制度，但該第五十七條之其他制衡規定基本上仍保留於增修條文第三條第二項，至有關立法院職權之憲法第六十三條規定則未更動，故公布於八十八年一月二十五日之立法院職權行使法第十六條，仍就行政院每一會期應向立法院提出施政方針及施政報告之程序加以規定，同法第十七條則定有：「行政院遇有重要事項發生，或施政方針變更時，行政院院長或有關部會首長應向立法院院會提出報告，並備質詢。前項情事發生時，如有立法委員提議，三十人以上連署或附議，經院會議決，亦得邀請行政院院長或有關部會首長向立法院院會報告，並備質詢。」所謂重要事項發生，即係指發生憲法第六十三條之國家重要事項而言，所謂施政方針變更則包括政黨輪替後重要政策改變在內。針對所發生之重要事項或重要政策之改變，除其應修改法律者自須向立法院提出法律修正案，其應修改或新頒命令者應予發布並須送置於立法院外，上開條文復課予行政院向立法院報告並備質詢之義務。如前所述，法定預算皆限於一定會計年度，並非反覆實施之法律可比，毋庸提案修正，遇此情形則須由行政院院長或

policy orientation, the Premier of the Executive Yuan or ministers of related agencies (or departments) shall submit a report to the full session of the Legislative Yuan, and be subject to interpellation. At the occurrence of an event stated in the previous paragraph, if and when any member of the Legislative Yuan proposes, with more than 30 members endorsing or concurring and a resolution of the full session, [the Legislative Yuan] may invite the Premier of the Executive Yuan or ministers of related agencies (or departments) to report to the full session of the Legislative Yuan, and be subject to interpellation." The so-called "occurrence of a major event" means important national affairs as indicated in Article 63 of the Constitution. The so-called "change of policy orientation" includes the change of important policies after a new ruling political party is elected. In dealing with changes due to the occurrence of a major event or change of policy orientation, statutory amendments must be submitted to the Legislative Yuan for those that require modification of laws. Matters that require modifications or the implementa-

有關部會首長向立法院院會提出報告並備質詢，立法委員亦得主動依同條第二項決議邀請行政院院長或部會首長提出報告並備質詢。上開報告因情況緊急或不能於事前預知者外，均應於事前為之。本件停止預算之執行，已涉國家重要政策之變更而未按上述程序處理，自有瑕疵，相關機關未依其行使職權之程序通知有關首長到院報告，而採取杯葛手段，亦非維護憲政運作正常處置之道。行政院應於本解釋公布之日起，儘速補行前述報告及備詢程序，相關機關亦有聽取其報告之義務。

tion of new regulations must be promulgated and [a copy] be submitted to the Legislative Yuan for review. In addition, the above-indicated provision further imposes on the Executive Yuan the obligation to report to the Legislative Yuan and be subject to [the latter's] interpellation. As stated above, unlike a statute which may be recurrently implemented, a statutory budget is always restricted to a certain fiscal year without the need for amending propositions. In this situation [the occurrence of a major event or change of policy orientation], it is necessary for the Premier of the Executive Yuan or ministers of related agencies (or departments) to submit a report to the full session of the Legislative Yuan, and be subject to interpellation. The Legislative Yuan may, on its own initiative and in accordance with Paragraph 2 of the same Article, invite the Premier or ministers of related agencies (or departments) to report to the full session of the Legislative Yuan, and be subject to interpellation. With the exception of emergency circumstances and unforeseen events, all such reports must be made beforehand. The withhold-

ing in the present petition, while already involving the change of a critical national policy, is [procedurally] flawed because it was not handled in accordance with the abovementioned process. [On the other hand,] instead of following the procedure in carrying out its duties by notifying the related heads [of the Executive Yuan] to report to the Legislative Yuan, the Related Institution used the boycotting measure, which certainly did not constitute the proper course in maintaining the normal operation of the Constitution. The Executive Yuan shall promptly make up the abovementioned reporting and interpellation process as of the date this Interpretation is announced, whereas the Related Institutions are also obligated to hear the Executive Yuan's report.

Having submitted the report to the Legislative Yuan in accordance with the abovementioned Article 3 of the Amendment of the Constitution and Article 17 of the Legislative Yuan Functionaries Act, and based upon the constitutional principle of democracy by representation, the Premier or ministers of the related agen-

行政院院長或有關部會首長依前述憲法增修條文第三條及立法院職權行使法第十七條向立法院提出報告之後，若獲多數立法委員之支持，基於代議民主之憲政原理，自可貫徹其政策之實施。若立法院於聽取報告後作成反對或其他決議，此一決議固屬對政策變更之異議，實具有確認法定預算效力之作

cies (or departments) may certainly carry on the previous budget withholding if and when such policy change acquires support by the majority members of the Legislative Yuan. If the Legislative Yuan should decide to oppose it or make other resolutions after listening to the report, however, while this resolution [in its appearance] serves as an objection to the change of policy, it in fact functions as a reaffirmation of the legal effect of the statutory budget, which should be distinguished from suggestive resolutions that only carry non-binding force. Depending upon the content of the resolution, all related agencies (and the Related Institution) must select the appropriate means to resolve [their dispute]: Either the Executive Yuan agrees to accept the majority view of the Legislative Yuan and continuously administers the statutory budget, or the Executive Yuan negotiates with all parties and interests within the Legislative Yuan in achieving a solution. If and when that is not possible, all related agencies (or departments) should take proper disposition in accordance with existing mechanisms under the Constitution. For example, to

用，與不具有拘束力僅屬建議性質之決議有間，應視其決議內容，由各有關機關選擇適當途徑解決：行政院同意接受立法院多數意見繼續執行法定預算，或由行政院與立法院朝野黨團協商達成解決方案。於不能協商達成解決方案時，各有關機關應循憲法現有機制為適當之處理，諸如：行政院院長以重要政策或施政方針未獲立法院支持，其施政欠缺民主正當性又無從實現總統之付託，自行辭職以示負責；立法院依憲法增修條文第三條第二項第三款對行政院院長提出不信任案，使其去職（不信任案一旦通過，立法院可能遭受解散，則朝野黨派正可藉此改選機會，直接訴諸民意，此亦為代議民主制度下解決重大政治衝突習見之途徑）；立法院通過興建電廠之相關法案，此種法律內容縱然包括對具體個案而制定之條款，亦屬特殊類型法律之一種，即所謂個別性法律，並非憲法所不許。究應採取何種途徑，則屬各有關機關應抉擇之問題，非本院所能越俎代庖予以解釋之事項。然凡此均有賴朝野雙方以增進人民福祉為先，以維護憲法秩序為念，始克回復憲政運作之常態，導引社會發展於正軌。

demonstrate his/her responsibility, the Premier may resign on the grounds that his/her critical policy or administrative orientation did not receive support from the Legislative Yuan; hence, the implementation of that policy lacks proper foundation and what the President has entrusted to him/her cannot be realized. The Legislative Yuan, in accordance with Article 3, Paragraph 2, Subparagraph 3, of the Amendment of the Constitution, may move for a no-confidence vote and force the Premier to resign (as soon as the no-confidence vote is passed, the Legislative Yuan may be disbanded and the political parties may then take this opportunity of re-election to appeal directly to the public, and this is also one common path in resolving major political conflicts in the system of democratic representation). When the Legislative Yuan enacted related bills concerning the construction of power plants, although the content of the law included provisions designed for specific, individual cases, it nevertheless belonged to a special category of laws, that is, the so-called legislation for an isolated case (Einzellfallgesetz), which is not dis-

allowed by the Constitution. Which path should be taken is a matter of selection among all related agencies (or departments), not an item for consideration by this Yuan. Yet [a successful outcome] depends upon both the ruling and opposition parties making the enhancement of the people's well-being a priority, being mindful of maintaining the order of the Constitution, so that the Constitution can resume its normal function and social developments can be guided in the right direction.

Justice Chi-Nan Chen filed concurring opinion in part.

Justice Sen-Yen Sun filed concurring opinion.

Justice Jyun-Hsiung Su filed concurring opinion.

Justice Tong-Schung Tai filed concurring opinion.

Justice Yueh-Chin Hwang filed concurring opinion.

Justice Tze-Chien Wang filed concurring opinion.

Justice Vincent Sze filed dissenting opinion in part.

本號解釋陳大法官計男提出部分協同意見書；孫大法官森焱、蘇大法官俊雄、戴大法官東雄、黃大法官越欽、王大法官澤鑑分別提出協同意見書；施大法官文森、董大法官翔飛分別提出部分不同意見書；劉大法官鐵錚提出不同意見書。

Justice Hsiang-Fei Tung filed dissenting opinion in part.

Justice Tieh-Cheng Liu filed dissenting opinion .

[EDITOR'S NOTE]

Taiwan is an island without many natural resources. The lack of coal and oil production, rugged landscape that often results in abrupt and unsteady flow of creek water, and the fast economic development in the last three decades put a severe strain on power supply on the island. To meet the ever-increasing demand on electricity, the government under the KMT rule turned to nuclear power for solution in the 1970s. Yet it often ran into strong, and sometimes violent, oppositions from environment protection and other interest groups. As the largest opposition political party to the KMT rule since its inception on September 28, 1986, the DPP first incorporated into its party platform a nuclearfree society in 1995 (as a means to form coalitions with other social groups against the KMT). As DPPs candidate for the 2000 presidential election, Mr. Chen Shuibian publicly declared

his promise to dismantle the fourth nuclear power plant construction and signed a pledge to that effect, thereby marking a major difference from his campaign opponents. Chen won the election on March 18, 2000.

The chronology of the episodes leading up to the present Constitution dispute demonstrate what a bumpy and roller coaster ride this nuclear power plant construction project has been through. In all likelihood it will probably not end just yet even with this Interpretation being issued. The proposal to construct the fourth nuclear power plant was first and formally initiated by the Taiwan Power Company (the state-owned monopoly under the supervision of the Ministry of Economic Affairs) in May 1980. This proposal proved to be highly controversial from the outset and in May 1985, the Executive Yuan announced that the construction would be temporarily suspended pending further communications and conciliations with the public. In July 1986, the Legislative Yuan suspended the budget for the project, requiring all existing expenditure

requests be subject to strict scrutiny of its Budget Committee. In December 1991, the Legislative Yuan passed the feasibility and environmental impact studies concerning the construction of the plant. In February 1992, the Executive Yuan approved the resumption of construction. Four months later, the Legislative Yuan released funding for the project. In July 1993, the Legislative Yuan resolved that it would not engage in any further review of the plant's budget and on July 12, 1994, a total budget of NT $112.5 billion (approximately US$3.75 billion under then currency exchange rate) was appropriated for the construction in fiscal year 1995. Yet on May 24, 1996, owing to a successful maneuvering of DPP members (minority party), the Legislative Yuan voted to abandon all related project concerning the fourth nuclear power plant. As a result, the Executive Yuan (then still under KMT's control) mounted a major campaign to override that decision and was able to accomplish that goal in October, less than five months later.[3] This was ac

[3] The bill for reconsideration was submitted on June 12, 1996 and the Legislative Yuan voted

complished by following the reconsideration process as laid out in Articles 3, Paragraph 2, Subparagraph 2 of the Constitution Amendments. In March 1999, the Nuclear Energy Commission issued the first license to construct the core nuclear reaction facilities.

Even before Mr. Chen Shui-bian was inaugurated as the President on May 20, 2000, his Minister of Economic Affairs appointee, Mr. Lin Hsin-yi, announced that all bidding competitions concerning the fourth nuclear power plant would be halted. On September 30, Minister Lin formally proposed to the President that the construction project ought to be terminated 3 The bill for reconsideration was submitted on June 12, 1996 and the Legislative Yuan voted to override its original resolution on October 18, 1996. There were violent protests on the streets each time the Legislative Yuan was convened to discuss the issue, resulting in personal injuries and property damages. Fortu-

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to override its original resolution on October 18, 1996. There were violent protests on the streets each time the Legislative Yuan was convened to discuss the issue, resulting in personal injuries and property damages. Fortunately, no lives were lost thus far.

nately, no lives were lost thus far. all together. Three days later, Premier Tang Fei of the Executive Yuan, a welldecorated retired air force general and a member of the KMT, abruptly resigned from that post. Ostensibly on health reasons, it was widely reported and President Chen himself later admitted, however, that the resignation was due primarily to disagreements over this issue. In the afternoon of October 27, 2000, the newly appointed Premier, Mr. Chang Chun-hsiung suddenly announced that all constructions related to the project were to be halted immediately. Because this announcement was made without prior consultation with the Legislative Yuan, it instantaneously created a major political and social-economic firestorm. Moreover, just in the morning of that same day, President Chen met with KMT's chairman, Mr. Lien Chan, who was also one of his opponents in the 2000 presidential bid, to show his reconciliation towards the opposition parties and willingness to discuss issues with them. The same gesture was given earlier with a meeting held between President Chen and Mr. James C. Sung, the leading

opponent in the 2000 presidential bid and currently chairman of the People First Party. Mr. Sung offered his advice on a cautious approach towards the construction of nuclear power plant. So this announcement was widely interpreted by the media as a slap on the face of the oppositions and a premeditated act to embarrass the oppositions. To make matters worse, this sharp reverse of decisions raised significant doubt about the government's own credibility and called into question the new government's financial commitment, policy-making capability and its process over a wide range of issues that may be controversial. In the midst of heightened confrontation, the Legislative Yuan (with majority members affiliated with the KMT) decided to boycott the new Administration after Premier Chang refused to resign, declared him a virtual personanon-grata and refused to invite him and the entire Cabinet to give the state of the nation and policy reports. Ironically, prior to becoming the Premier, Chang was a vocal opposition member of the Legislative Yuan who joined his colleagues in initiating the same treatment to

his predecessor, Mr. Lien Chan, over Lien's concurrent occupation as the Vice President and Premier, which ignited another constitution controversy in 1996 (see J. Y. Interpretation No. 419, text and notes). The two branches of the government eventually locked in a stalemate that lasted 171 days until after the J. Y. Interpretation No. 520 was issued. During this period, there was literally no contact between the two branches and not a single bill was enacted.

As can be seen from the holding and reasoning of this Interpretation, the Grand Justices tried very hard to steer clear the political issue of whether to support or oppose nuclear power facilities while focusing, instead, on the underlying Constitution dispute, that is, the status of the so-called statutory budget (whether it is a statutory law or its functional equivalent) and the exercising or executing of a given budgetary item. Even so, the result is far from unanimous and the majority reasoning (as being translated herewith) is nevertheless tempted to more or less touch on the political process that it should other-

wise have wanted to avoid. For example, towards the end of the Reasoning, instead of merely directing the Executive and Legislative Yuan to strictly follow the Constitution, the majority opinion painstakingly illustrated different kinds of hypothetical scenarios and offered advisory opinions on what the two government branches may do in each case. However, it is apparent that even with such an elaborative road map, the majority opinion still cannot quite declare what may be the legal and political consequences should the Legislative Yuan, having listened to the Premier's report, once again vote not to support the Administration's position.[4] Six Grand Justices filed individual concurring opinions and three filed dissenting opinions. Indeed, this may be one of the most diverse Constitution interpretations ever rendered by the Judicial Yuan.

On January 17, 2001, two days after the issuance of J. Y. Interpretation No. 520, the Executive Yuan in its 2718th

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[4] These points are of particular concern to all three Grand Justices who filed dissenting opinions.

Meeting resolved to abide by this Interpretation. In accordance with this Interpretation, the Legislative Yuan conducted an extraordinary session on January 30 and 31, 2001 to hear Premier Changs report and engage in interpellation.[5] Having done so, the Legislative Yuan immediately resolved once again to oppose the Executive Yuans decision and reaffirm the status of the fourth nuclear power plant budget being that of a statutory budget. Now with no recourse left, Premier Chang sought to work out a settlement with the Legislative Yuan and the head of the two Yuans did reach an agreement and jointly sign it on February 13, 2001. Public announcement of the accord was made the next day and all constructions were to be resumed as soon as possible. This development allowed the entire Cabinet to return to the Legislative Yuan to fulfill their responsible duties under the Constitution. It also reopened negotiation channels between the two government branches for other items on

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[5] This is the third time in the history of the Legislative Yuan to call forth an extraordinary session. The two previous occasions took place in 1951 and 1952, respectively.

the legislative agenda.[6] Despite this accord, the internal political tension is far from over. In a bizarre turn of event, to demonstrate their frustration, many in the DPP, fearing their own president had betrayed them, broke rank with Chen and organized a large-scale street protest against the government's nuclear policy, but was careful not to point their fingers at the administration officials directly.[7] Officials in the Executive Yuan and the ranks and files of the DPP also began suggesting the possibility of setting up a national referendum to have the general public decide the issue once and for all.[8] This can be highly sensitive given that the Constitution does not specifically authorize such a mechanism and even if the system can be set up, perhaps other controversial and divisive issues such as Taiwan independ-

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[6] See Resolutions of the 2721st Meeting of the Executive Yuan, February 14, 2001. The critical consensus reached by both Yuans is to achieve the common and ultimate goal of a "nuclear-free homeland" in the future. However, in a written statement entitled "Painful Choice, Forever Insistence" issued on the same day, Premier Chang tried to explain to DPP's core constituents the flip-flop of this policy as the good well gesture of the Executive Yuan toward the Legislative Yuan in the hope to show national unity in solving many social and economic problems.

[7] See Lawrence Chung, Chen Gets Flak in N-Plant Protest, STRAIT TIMES, February 25, 2001, p. 1.

[8] See supra note 6.

ence can be placed on the ballot, yet no one knows how to follow up on the voting result, however it may turn out. Recognizing that the issue has polarized the society as well as the unfavorable political and economic climate (Taiwan has already been in the midst of its worst economic recession since the early 1960s), President Chen declared in late July that he would not support such a move, then the Executive Yuan decided on August 20, 2001 to temporarily scrap the plan.[9] But a senior official did not rule out the possibility that this proposal may be brought up again once the election is out of the way.[10] Therefore, should this proposal indeed be carried forward in the future, it could set off yet another round of major Constitution controversies. In the meantime, while the nuclear power plant construction has indeed resumed, many negotiations are also taking place concerning breach of contracts, damages, insurance indemnity

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[9] See Jason Blatt, Power-Plant Referendum Scrapped Party Dodges Nuclear Controversy Ahead of Poll But Refuses to Rule Out Similar Move in Future, SOUTH CHINA MORNING POST, August 11, 2001, p. 7; see also China Post Staff, Chen Opposes Nuclear Plant Referendum, CHINA POST, July 11, 2001, p. 1.

[10] Remarks by Chou Yi-jen, Executive Secretary of the Executive Yuan and a member of the NineMember Policy-Decision Core Team. See Jason Blatt, id.

and other issues.[11] On the other hand, the Chen Administration is moving forward with another plan to shut down the three existing nuclear power plants, several years before their scheduled retirement.[12] Given that Taiwan will have another round of elections for the entire Legislative Yuan in November 2001, it is far from certain whether this nuclear power plant construction will indeed be carried forward into 2003 and beyond. Therefore, after two decades, Taiwan is still struggling with many issues revolving around the shortage of energy supply and the saga is likely to continue in the foreseeable future.

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[11] The estimated total cost is likely to top US$5.6 billion and the cost for the suspension of construction will likely cost another US$100 million. See China Post Staff, Opposition Approves Gov't Compensation Plan for Taipower, June 7, 2001, p. 1. The construction has completed almost 31% of the entire project and the plant was scheduled to become fully operational in 2004 before it was grinded to a halt.

[12] See Agence France-Presse, Closure of Taiwanese Nuclear Plants to Cost 10 Billion U.S. Dollars, June 25, 2001.

J. Y. Interpretation No.521（February 9, 2001）*

ISSUE: Are the general provisions of Article 37 of the Customs Smuggling Control Act, which punishes the act of untruthful report of the origin of imported goods, in violation of the Constitution?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）; Articles 1, 3, 4, 36 and 37 of the Customs Smuggling Control Act（海關緝私條例第一條、第三條、第四條、第三十六條及第三十七條）; Article 35 of the Act Governing Relations between Peoples of the Taiwan Area and the Mainland Area（台灣地區與大陸地區人民關係條例第三十五條）; Articles 5 and 11 of the Trade Act（貿易法第五條、第十一條）.

KEYWORDS:

Principle of clarity and definiteness of law（法律明確性原則）, indefinite concepts of law（不確定法律概念）, general clauses of law（法律概括條款）, teleological interpretation（目的解釋）.**

HOLDING: The principle of clarity and definiteness of law does not simply determine the form of the law

解釋文：法律明確性之要求，非僅指法律文義具體詳盡之體例而言，立法者仍得衡酌法律所規範生活事實之

* Translated by Vincent C. Kuan.

** Contents within frame, not part of the original text, are added for reference purpose only.

whose textual significations should be specific and exhaustive. The legislators may still formulate appropriate provisions by using generalized clauses of law after considering the complexity of the circumstances of life regulated by the law and the appropriateness of such law as applied to a specific case. This Court has elaborated on the foregoing in J.Y. Interpretation No. 432. In order to ensure that importers make honest declarations as to the matters relating to imported cargoes so as to carry through the implementation of applicable laws and regulations, Article 37-I of the Customs Smuggling Control Act generally provides that "any other illegal conduct" shall also be punishable in addition to the false declarations of the descriptions, quantities and other matters of or relating to the cargoes as provided in the first three subparagraphs of said article. This general clause of law refers to the kind of matters relating to the declaration of imported goods that are in violation of the law and are similar to the false declarations described in the first three subparagraphs of said article. In respect of the punishment regarding the false decal-

複雜性及適用於個案之妥當性，運用概括條款而為相應之規定，業經本院釋字第四三二號解釋闡釋在案。為確保進口人對於進口貨物之相關事項為誠實申報，以貫徹有關法令之執行，海關緝私條例第三十七條第一項除於前三款處罰虛報所運貨物之名稱、數量及其他有關事項外，並於第四款以概括方式規定「其他違法行為」亦在處罰之列，此一概括規定，係指報運貨物進口違反法律規定而有類似同條項前三款虛報之情事而言。就中關於虛報進口貨物原產地之處罰，攸關海關緝私、貿易管制有關規定之執行，觀諸海關緝私條例第一條、第三條、第四條、貿易法第五條、第十一條及台灣地區與大陸地區人民關係條例第三十五條之規定自明，要屬執行海關緝私及貿易管制法規所必須，符合海關緝私條例之立法意旨，在上述範圍內，與憲法第二十三條並無牴觸。至於依海關緝私條例第三十六條、第三十七條規定之處罰，仍應以行為人之故意或過失為其責任條件，本院釋字第二七五號解釋應予以適用，併此指明。

ration of the country of origin for imported cargo, it deeply concerns the enforcement of the customs' anti-smuggling activities, trade control and other related rules, which is not only made clear after examining the provisions of Articles 1, 3 and 4 of the Customs Smuggling Control Act, Articles 5 and 11 of the Trade Act and Article 35 of the Act Governing Relations between Peoples of the Taiwan Area and the Mainland Area, but is also essential to the enforcement of the laws and regulations concerning the customs' anti-smuggling activities and trade control. As such, it is consistent with the legislative intent of the Customs Smuggling Control Act and, insofar as it does not the aforesaid boundary, it is not in conflict with Article 23 of the Constitution. As for the punishment provided in Articles 36 and 37 of the Customs Smuggling Control Act, an actor's liability should still be conditioned upon his or her intention or negligence. It should also be pointed out that, in this respect, J.Y. Interpretation No. 275 shall apply.

REASONING: The principle of clarity and definiteness of law does not simply determine the form of the law whose textual significations should be specific and exhaustive. The legislators, in devising legislation to establish a system, may still formulate appropriate provisions by using indefinite concepts of law or generalized clauses of law after considering the complexity of the circumstances of life regulated by the law and the appropriateness of such law as applied to a specific case. Where abstract concepts are used in legislation in respect of the behavioral criteria for the regulated class and the punishment, they should not be considered to run counter to the aforesaid principle if the meanings thereof are neither incomprehensible nor unforeseeable to the regulated class, which may also be confirmed by means of judicial review. This Court has elaborated on the foregoing in J.Y. Interpretation No. 432.

解釋理由書：法律明確性之要求，非僅指法律文義具體詳盡之體例而言，立法者於立法定制時，仍得衡酌法律所規範生活事實之複雜性及適用於個案之妥當性，從立法上適當運用不確定法律概念或概括條款而為相應之規定。有關受規範者之行為準則及處罰之立法使用抽象概念者，苟其意義非難以理解，且為受規範者所得預見，並可經由司法審查加以確認，即不得謂與前揭原則相違，業經本院釋字第四三二號解釋闡釋在案。

In order to ensure that importers make honest declarations as to the matters relating to imported cargoes so as to accomplish the implementation of applica-

為確保進口人對於進口貨物之相關事項為誠實申報，以貫徹有關法令之執行，海關緝私條例第三十七條第一項除於前三款處罰虛報所運貨物之名稱、

ble laws and regulations, Article 37-I of the Customs Smuggling Control Act generally provides that "any other illegal conduct" shall also be punishable in addition to the false declarations of the descriptions, quantities and other matters of or relating to the cargoes as provided in the first three subparagraphs of said article. This general clause of law refers to the kind of matters relating to the declaration of imported goods that are in violation of the law and are similar to the false declarations described in the first three subparagraphs of said article, which is only natural when it comes to teleological interpretation.

數量及其他有關事項外，並於第四款以概括方式規定「其他違法行為」亦在處罰之列，此一概括規定，係指報運貨物進口違反法律或法律明確授權之命令規定而有類似同條項前三款虛報之情事而言，此乃目的性解釋所當然。

Articles 1, 3 and 4 of the Customs Smuggling Control Act provide for anti-smuggling and control rules in respect of the smuggling or declaration of imported cargoes. According to the first part of Article 5 of the Trade Act, the government may prohibit or control trading activities with specific countries or regions pursuant to statutory procedure for the purpose of national security. The competent authority is also authorized under Article 11 of said

海關緝私條例第一條、第三條、第四條，就私運貨物進口或報運貨物進口，有查緝管制之規定。貿易法第五條前段，政府基於國家安全之目的，亦得依法定程序禁止或管制與特定國家或地區之貿易；同法第十一條並授權主管機關「基於國防、治安、文化、衛生、環境與生態保護或政策需要」，得限制貨品之輸入或輸出。又台灣地區與大陸地區人民關係條例第三十五條第二項亦明定，台灣地區與大陸地區貿易，非經主

Act to impose restrictions on the import or export of goods “for the needs of national defense, social security, culture, hygiene, environmental and ecological protection or policy.” In addition, Article 35-II of the Act Governing Relations between Peoples of the Taiwan Area and the Mainland Area clearly provides, “Except as otherwise approved by the competent authority, no business dealing may be conducted between any entities of the Taiwan Area and the Mainland Area.” Thus it is made known that the government may prohibit or restrict trading activities with specific countries or regions for such policy purposes as the preservation of national security and normal development of economy and trade. The enforcement of the foregoing provisions hinges on the determination of the country of origin for imported goods. If importers of the goods are allowed to make untrue declarations of the country of origin, then the national trade control policy will certainly become very difficult to implement. Therefore, in respect of the punishment regarding the false declaration of the country of origin for imported

管機關許可，不得為之。凡此均顯示，政府基於維護國家安全及經濟貿易正常發展等政策目的，得禁止或限制與特定國家或地區之貿易。上開規定之執行，均以進口貨物原產地之認定為基礎，若進口人得就貨物之原產地為不實之申報，則國家貿易管制政策勢將難以實現。是關於虛報進口貨物原產地之處罰，攸關海關緝私、貿易管制有關規定之執行，觀諸前述海關緝私條例、貿易法及台灣地區與大陸地區人民關係條例之相關規定，要屬執行海關緝私及貿易管制法規所必須，符合海關緝私條例之立法意旨，在上述範圍內，與憲法第二十三條並無牴觸。至於依海關緝私條例第三十六條、第三十七條規定之處罰，仍應以行為人之故意或過失為其責任條件，本院釋字第二七五號解釋應予以適用，併此指明。

cargo, it deeply concerns the enforcement of the customs' anti-smuggling activities, trade control and other related rules, which is not only made clear after examining the aforesaid relevant provisions of the Customs Smuggling Control Act, the Trade Act and the Act Governing Relations between Peoples of the Taiwan Area and the Mainland Area, but also is essential to the enforcement of the laws and regulations concerning the customs' anti-smuggling activities and trade control. As such, it is consistent with the legislative intent of the Customs Smuggling Control Act and, insofar as it does not the aforesaid boundary, it is not in conflict with Article 23 of the Constitution. As for the punishment provided in Articles 36 and 37 of the Customs Smuggling Control Act, an actor's liability should still be conditioned upon his or her intention or negligence. It should also be pointed out that, in this respect, J.Y. Interpretation No. 275 shall apply.

J. Y. Interpretation No.522（March 9, 2001）*

ISSUE: Is the provision of Article 177 of the Securities Exchange Act amended and promulgated on January 29, 1988, which provides penalty for "violation of any other prohibitive, injunctive or restrictive order issued by the authority in charge", in line with the principle of charity and definiteness of law?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）; Article 177 of the Securities Exchange Act（證券交易法第一百七十七條）.

KEYWORDS:

No crime and no punishment without pre-existing law（罪刑法定主義）, principle of clarity and definiteness of punishment（刑罰明確性原則）.**

HOLDING: The imposition of criminal penalties on the responsible persons and personnel in the securities business responsible for violation of any prohibitive order, stop order or restraining order within the scope of their business involves restrictions on the people's

解釋文：對證券負責人及業務人員違反其業務上禁止、停止或限制命令之行為科處刑罰，涉及人民權利之限制，其刑罰之構成要件，應由法律定之；若法律就其構成要件，授權以命令為補充規定者，其授權之目的、內容及範圍應具體明確，而自授權之法律規定

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rights. Therefore, the requisite elements of such penalties shall be prescribed by law. If the law authorizes the issuance of orders to make supplementary provisions in respect of the requisite elements, the purposes, contents and scope of such authorization shall be specific and clear. Furthermore, the punish ability of the various types of conduct must be foreseeable from the provisions of the enabling law so as to be in line with the principle of clarity and definiteness of punishment. Article 177 (iii) of the Securities Exchange Act as amended and promulgated on January 29, 1988, provides, "Any person who otherwise violates any prohibitive order, stop order or restraining order issued by the competent authority pursuant to this Act shall be punishable with imprisonment for not more than one year, or detention and/or a fine of not more than NT$100,000." In light of the above, as far as the authorization at issue is concerned, the contents of the acts that may be subject to punishment are unforeseeable, and will be made clear only from administrative orders issued by administrative agencies. Therefore, the relevant provisions are inconsis-

中得預見其行為之可罰，方符刑罰明確性原則。中華民國七十七年一月二十九日修正公布之證券交易法第一百七十七條第三款規定：違反主管機關其他依本法所為禁止、停止或限制命令者，處一年以下有期徒刑、拘役或科或併科十萬元以下罰金。衡諸前開說明，其所為授權有科罰行為內容不能預見，須從行政機關所訂定之行政命令中，始能確知之情形，與上述憲法保障人民權利之意旨不符，自本解釋公布日起，應停止適用。證券交易法上開規定於八十九年七月十九日經修正刪除後，有關違反主管機關依同法所為禁止、停止或限制之命令，致影響證券市場秩序之維持者，何者具有可罰性，允宜檢討為適當之規範，併此指明。

tent with the aforesaid constitutional intent to protect the people's rights and thus shall cease to apply as of the date of this Interpretation. It should also be noted that, with respect to the question about which types of conduct that affect the securities market order should be punishable for violation of a prohibitive order, stop order or restraining order issued by the competent authority pursuant to this Act subsequent to the amendments and deletions of relevant provisions of the Securities Exchange Act on July 19, 2000, appropriate provisions should be set forth to regulate such types of conduct after due reviews and consideration have been given.

REASONING: Although it is constitutional for the legislature, by means of legislative delegation, to authorize administrative agencies to issue orders for the purposes of supplementing the laws, the purposes, contents and scope of such authorization shall be specific and clear so as to conform to the intent of Article 23 of the Constitution. This Court has repeatedly elaborated on this point when delivering its opinions. As for the degree of

解釋理由書：立法機關得以委任立法之方式，授權行政機關發布命令，以為法律之補充，雖為憲法之所許，惟其授權之目的、內容及範圍應具體明確，始符憲法第二十三條之意旨，迭經本院解釋在案。至於授權條款之明確程度，則應與所授權訂定之法規命令對人民權利之影響相稱。刑罰法規關係人民生命、自由及財產權益至鉅，自應依循罪刑法定主義，以制定法律之方式為之，如法律授權主管機關發布命令為

specificity and clarity of the authorization, it should be in proportion to the impact of the orders issued by means of such authorization on the rights of the people. Since criminal laws deeply concern the people's rights and interests relating to their lives, freedoms and properties, such laws should be enacted so as to be in conformity with the principle of "no crime and no punishment without pre-existing law." If the law authorizes the issuance of orders by the competent authorities to make supplementary provisions, the punishability of the various types of conduct must be foreseeable from the provisions of the enabling law so as to be in line with the principle of clarity and definiteness of punishment.

補充規定時，須自授權之法律規定中得預見其行為之可罰，方符刑罰明確性原則。

The imposition of criminal penalties on the persons and personnel in the securities business responsible for violation of any prohibitive order, stop order or restraining order within the scope of their business involves the protection of the people's rights. As illustrated earlier, the various types of conduct that are punishable should be clearly specified in the Se-

對證券負責人及業務人員違反其業務上禁止、停止或限制命令之行為科處刑罰，關係人民權利之保障，依前所述，其可罰行為之類型固應在證券交易法中明文規定，惟法律若就犯罪構成要件，授權以命令為補充規定時，其授權之目的、內容與範圍即應具體明確，自授權之法律規定中得預見其行為之可罰，始符首開憲法意旨。七十七年一月

curities Exchange Act. However, if the law authorizes the issuance of orders to make supplementary provisions in respect of the requisite elements of various offenses, the purposes, contents and scope of such authorization shall be specific and clear, and the punishability of the various types of conduct must be foreseeable from the provisions of the enabling law so as to be in line with the aforesaid constitutional intent. Article 177 (iii) of the Securities Exchange Act as amended and promulgated on January 29, 1988, provides, "Any person who otherwise violates any prohibitive order, stop order or restraining order issued by the competent authority pursuant to this Act shall be punishable with imprisonment or detention? for not more than one year, and/or a fine of not more than NT$100,000." In entrusting administrative agencies to specify the punishable acts by issuing orders, the contents of the acts that may be subject to punishment are indefinite, and will be made clear only from the administrative orders issued by the administrative agencies. Therefore, the relevant provisions are inconsistent with the aforesaid consti-

二十九日修正公布之證券交易法第一百七十七條第三款規定：違反主管機關其他依本法所為禁止、停止或限制命令者，處一年以下有期徒刑、拘役或科或併科十萬元以下罰金。將科罰行為之內容委由行政機關以命令定之，有授權不明確而必須從行政機關所訂定之行政命令中，始能確知可罰行為內容之情形者，與上述憲法保障人民權利之意旨不符，自本解釋公布日起，應停止適用。惟人民之行為如依當時之法律係屬違法者，自不得依本解釋而得主張救濟，乃屬當然，爰併予敘明。證券交易法上開規定於八十九年七月十九日經修正刪除後，有關違反主管機關依同法所為禁止、停止或限制之命令，致影響證券市場秩序之維持者，何者具有可罰性，允宜檢討為適當之規範，併此指明。

tutional intent to protect the people's rights and thus shall cease to apply as of the date of this Interpretation. Needless to say, however, it should be noted that, if the types of conduct of the people were illegal according to the then existing law, no remedy should be available by resorting to this Interpretation.

It should also be noted that, with respect to the question about which types of conduct that affect the securities market order should be punishable for violation of a prohibitive order, stop order or restraining order issued by the competent authority pursuant to this Act subsequent to the amendments and deletions of relevant provisions of the Securities Exchange Act on July 19, 2000, appropriate provisions should be set forth to regulate such types of conduct after due review and consideration have been given.

證券交易法上開規定於八十九年七月十九日經修正刪除後，有關違反主管機關依同法所為禁止、停止或限制之命令，致影響證券市場秩序之維持者，何者具有可罰性，允宜檢討為適當之規範，併此指明。

J. Y. Interpretation No.523（March 22, 2001）*

ISSUE: Does Article 11 of the Gangster Prevention Act regarding the court's discretion to confine the accused violate the constitutional principle of necessity and Article 8 of the Constitution, thus being null and void?

RELEVANT LAWS:

Articles 8 and 23 of the Constitution（憲法第八條、第二十三條）; Articles 6, 7, 11 and 23 of the Gangster Prevention Act（檢肅流氓條例第六條、第七條、第十一條及第二十三條）.

KEYWORDS:

personal freedom（人身自由）, confinement（留置）, detention（羈押）,court's discretion（法院裁量）, hoodlums（流氓）.**

HOLDING: The procedure upon which a governmental organ bases its imposition of any measures restraining the people's liberty, regardless of whether their status is that of a criminal defendant or not, must be prescribed by statutes. The contents of the statutes must be proper in

解釋文：凡限制人民身體自由之處置，不問其是否屬於刑事被告之身分，國家機關所依據之程序，須依法律規定，其內容更須實質正當，並符合憲法第二十三條所定相關之條件，方符憲法第八條保障人身自由之意旨，迭經本院解釋在案。

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* Translator by Jaw-Perng Wang.

** Contents within frame, not part of the original text, are added for reference purpose only.

substance, and must comply with the relevant conditions set up in Article 23 of the Constitution. This Yuan has repeatedly interpreted that, without complying with the abovementioned statutes, the measures would not be consistent with Article 8 of the Constitution guaranteeing physical freedom.

Article 11, Paragraph 1, of the Gangster Prevention Act (hereinafter the "Act") provides "The court may confine the accused for a period of no more than a month. If necessary, the court may extend the confinement for a period of one month. The extension shall be limited to one time only." This confinement is a compulsory measure whose purpose is to keep the accused in a certain place to maintain orderly procedure before the final decision of the court. This is a serious restraint on the people's physical freedom. Nevertheless, the Act does not explicitly provide the conditions upon which a court may base its imposition of confinement. In addition to the grounds for making a warrant arrest without previous summons, as provided in Articles 6 and 7, which may also be

檢肅流氓條例第十一條第一項規定：「法院對被移送裁定之人，得予留置，其期間不得逾一月。但有繼續留置之必要者，得延長一月，以一次為限。」此項留置處分，係為確保感訓處分程序順利進行，於被移送裁定之人受感訓處分確定前，拘束其身體自由於一定處所之強制處分，乃對人民人身自由所為之嚴重限制，惟同條例對於法院得裁定留置之要件並未明確規定，其中除第六條、第七條所定之事由足認其有逕行拘提之原因而得推論具備留置之正當理由外，不論被移送裁定之人是否有繼續嚴重破壞社會秩序之虞，或有逃亡、湮滅事證或對檢舉人、被害人或證人造成威脅等足以妨礙後續審理之虞，均委由法院自行裁量，逕予裁定留置被移送裁定之人，上開條例第十一條第一項之規定，就此而言已逾越必要程度，與憲

deemed to be proper reasons for confinement, the Act authorizes the court full discretion to decide the accused's confinement without regard for whether the accused would be likely to breach the social order again, or whether there is any risk that the accused would try to avoid further trials; for example, that the accused would try to escape, conceal and destroy evidence, or threaten the accuser, victims, or witnesses. In this regard, Article 11, Paragraph 1, of the Act has exceeded the extent of necessity, and is inconsistent with Articles 8 and 23 of the Constitution and this Yuan's previous Interpretations. It shall become void and null within one year from the date of this Interpretation. Before the amendments of the relevant statute, the courts shall carefully and properly consider the essence of this Interpretation in making their confinement decision.

法第八條、第二十三條及前揭本院解釋意旨不符，應於本解釋公布之日起一年內失其效力。於相關法律為適當修正前，法院為留置之裁定時，應依本解釋意旨妥為審酌，併予指明。

REASONING: The procedure upon which a governmental organ bases its imposition of any measures restraining the people's liberty, regardless of whether their status is that of a criminal defendant

解釋理由書：凡限制人民身體自由之處置，不問其是否屬於刑事被告之身分，國家機關所依據之程序，須依法律規定，其內容更須實質正當，並符合憲法第二十三條所定相關之條件，方

or not, must be prescribed by statutes. The contents of the statutes must be proper in substance, and must comply with the relevant conditions set up in Article 23 of the Constitution. Interpretations Nos. 384 and 471 of this Yuan have stated that without complying with the abovementioned statutes, the measures would not be consistent with Article 8 of the Constitution guaranteeing physical freedom.

符憲法第八條保障人身自由之意旨，業經本院釋字第三八四號、第四七一號解釋等釋示在案。

Article 23 of the Act provides that in trying gangster cases, the courts shall apply the Code of Criminal Procedure (hereinafter the "Code") if the Act and other statutes or regulations do not contain special provisions. Nevertheless, in trying gangster cases and in application of the law, the courts shall also consider and weigh the differences between the norms and structures of the Act and the Code. Article 11, Paragraph 1, of the Act provides: "The court may confine the accused for a period of no more than a month. If necessary, the court may extend the confinement for a period of one month. The extension shall be limited to one time only." The Act's confinement is to assure

檢肅流氓條例第二十三條規定：法院受理流氓案件，同條例及其他法令未規定者，準用刑事訴訟法之規定。但法院受理流氓案件時仍應斟酌同條例與刑事法規在規範設計上之差異而為適用。同條例第十一條第一項規定：「法院對被移送裁定之人，得予留置，其期間不得逾一月。但有繼續留置之必要者，得延長一月，以一次為限。」該留置處分係法院於感訓處分裁定確定前，為確保日後審理程序之處置，與刑事訴訟法之羈押在處分目的上固有相類之處，惟同條例有意將此種處分另稱「留置」而不稱「羈押」，且其規定之要件亦不盡相同，顯見兩者立法之設計有異，自不能以彼例此。檢肅流氓條例授予法院就留置處分有較大之裁量權限，

the effectiveness of the trial before the court's decision becomes final, and its purpose is certainly similar to that of the detention in the Code. The facts, that the Act purposely terms the measure as "confinement" instead of "detention" and that its requirements are not completely the same as those in the Code, demonstrate that the legislative structures of the two statutes are different and that one shall not automatically apply to the other. The court's broader discretion of confinement authorized by the Act is certainly necessary for maintaining the social order. However, those provisions relevant to the restraints of people's rights must not be vague, and shall comply with the constitutional protection of human rights and the principle of proportionality. (See J.Y. Interpretation No. 384).

固係維護社會秩序之所必須，然其中有關限制人民權利者，應符合明確性原則，並受憲法基本權保障與比例原則之限制，則無不同（參照本院釋字第三八四號解釋）。

Article 11, Section 1, of the Act provides that the court may confine the accused in a certain place. It is a compulsory measure whose purpose is to maintain orderly procedure before the final decision of the court. Although it is necessary, it is a serious restraint on the people's

檢肅流氓條例第十一條第一項規定，法院得為拘束被移送裁定之人於一定處所之留置裁定，係為確保感訓處分程序順利進行，於被移送裁定之人受感訓處分確定前，拘束其身體自由於一定處所之強制處分，雖有其必要，惟此乃對人民人身自由所為之嚴重限制。同條

physical freedom. The Act does not explicitly provide the conditions upon which a court may base its imposition of confinement. Articles 6 and 7 of the Act provide the grounds that a court may issue an arrest warrant without previous summons. In addition to the above grounds, which may be deemed to be proper reasons for confinement, the Act authorizes the court full discretion to decide the accused's confinement without regard for whether the accused would breach the social order again, or whether there is any risk that the accused would try to prevent further trial; for example, that the accused would try to escape, conceal and destroy evidence, or threaten the accuser, victims, or witnesses. In this regard, Article 11, Paragraph 1, of the Act has exceeded the extent of necessity, and is inconsistent with Articles 8 and 23 of the Constitution and this Yuan's previous Interpretations. It shall become void and null within one year from the date this Interpretation. Before the amendments of the relevant statute, the courts shall carefully and properly consider the essence of this Interpretation in making their confinement decision.

例對於法院得裁定留置之要件並未明確規定，除被移送裁定之人係依同條例第六條、第七條之規定而為逕行拘提，法院於核發拘票時已確認被移送裁定之人具有逕行拘提之事由，因而得推論其已同時符合留置之正當理由外，不論被移送裁定之人是否有繼續嚴重破壞社會秩序之虞，或有逃亡、湮滅事證或對檢舉人、被害人或證人造成威脅等足以妨礙後續審理之虞，均委由法院自行裁量，逕予裁定留置被移送裁定之人，上開條例第十一條第一項之規定，就此而言已逾越必要程度，與憲法第八條、第二十三條及前揭本院解釋意旨不符，應於本解釋公布之日起一年內失其效力。於相關法律為適當修正前，法院為留置之裁定時，應依本解釋意旨妥為審酌，併予指明。

Justice Tze-Chien Wang filed dissenting opinion in part, in which Justice Geng Wu joined.

本號解釋王大法官澤鑑與吳大法官庚共同提出部分不同意見書。

J. Y. Interpretation No.524（April 20, 2001）*

ISSUE: Are some provisions of National Health Insurance Act inconsistent with the doctrine of legal reservation?

RELEVANT LAWS:

Articles 5, 31, 39, 41, 50 and 51 of the National Health Insurance Act（全民健康保險法第五條、第三十一條、第三十九條、第四十一條、第五十條、第五十一條）; Article 31, Paragraph 2 of the Regulation Governing the Medical Services Covered under National Health Insurance（全民健康保險醫療辦法第三十一條第二項）; Article 20 of the Regulation Governing the Review of the Medical Services Rendered by the Medical Organizations for National Health Insurance（全民健康保險醫事服務機構醫療服務審查辦法第二十條）.

KEYWORDS:

national health insurance（全民健康保險）, principle of clarity and definiteness of law（法律明確性原則）, doctrine of legal reservation（法律保留原則）.**

HOLDING: National health insurance, having to do with the welfare of all citizens, is a kind of compulsory social insurance; therefore, the rights or obligeㄧ

解釋文：全民健康保險為強制性之社會保險，攸關全體國民之福祉至鉅，故對於因保險所生之權利義務應有明確之規範，並有法律保留原則之適

* Translated by Professor Tze-Shiou Chien.

** Contents within frame, not part of the original text, are added for reference purpose only.

tions relating to the insurance should be clearly defined and regulated by the doctrine of legal reservation. If the enabling statute stipulates the supplementation of its rules in regulations on the contents of insurance relations, the stipulation should be concrete and clear and should be foreseeable by the insured. Furthermore, if the enabling statute delegates to the relevant authority the promulgation of regulations according to some specified procedure to fill the gaps in the statute, the agency should abide by this procedure—it should avoid the form of regulations with administrative rules which have validity only within the administrative organization to substitute for the regulations. If the enabling statute does not provide for further delegation , the agency cannot delegate its subordinate agencies to promulgate those related rules.

用。若法律就保險關係之內容授權以命令為補充規定者，其授權應具體明確，且須為被保險人所能預見。又法律授權主管機關依一定程序訂定法規命令以補充法律規定不足者，該機關即應予以遵守，不得捨法規命令不用，而發布規範行政體系內部事項之行政規則為之替代。倘法律並無轉委任之授權，該機關即不得委由其所屬機關逕行發布相關規章。

The legislative purpose of Article 39 of the National Health Insurance Act, which concerns the items not covered by national health insurance, is to clearly define the limits of coverage. Accordingly, except for those uncovered items which

全民健康保險法第三十九條係就不在全民健康保險給付範圍之項目加以規定，其立法用意即在明確規範給付範圍，是除該條第一款至第十一款已具體列舉不給付之項目外，依同條第十二款規定：「其他經主管機關公告不給付之

are listed in Subparagraphs 1-11 of the same Article, the relevant authority, when it implements Subparagraph 12, which provides: "other treatments and drugs promulgated by the relevant authority not to be covered," should consider the legislative purposes of similar Subparagraphs of the same Article to ex ante indicate those medical services and drugs which are not covered. Article 31 of the same Act provides that: "In case of illness, injury, or maternity of the beneficiary, the contracted medical care institutions shall provide ambulatory or hospital care pursuant to the Medical Benefit Regulations of this Insurance. Physicians may deliver prescriptions to the beneficiary to be dispensed by the pharmacy." "The Medical Benefit Regulations mentioned in the preceding paragraph shall be drafted by the relevant authority and submitted to the Executive Yuan for approval before promulgation." "The delivery of medication, referred to in Paragraph 1, shall be made in accordance with Article 102 of the Pharmaceutical Affairs Act." The content of this article is too broad to be consistent with the principle of clarity and

診療服務及藥品」，主管機關自應參酌同條其他各款相類似之立法意旨，對於不給付之診療服務及藥品，事先加以公告。又同法第三十一條規定：「保險對象發生疾病、傷害或生育事故時，由保險醫事服務機構依本保險醫療辦法，給予門診或住院診療服務；醫師並得交付處方箋予保險對象至藥局調劑。」「前項醫療辦法，由主管機關擬訂，報請行政院核定後發布之。」「第一項藥品之交付，依藥事法第一百零二條之規定辦理。」內容指涉廣泛，有違法律明確性原則，其授權相關機關所訂定之健康保險醫療辦法，應屬關於門診或住院診療服務之事項，中華民國八十四年二月二十四日發布之全民健康保險醫療辦法，不僅其中有涉及主管機關片面變更保險關係之基本權利義務事項，且在法律無轉委任之授權下，該辦法第三十一條第二項，逕將高科技診療項目及審查程序，委由保險人定之，均已逾母法授權之範圍。另同法第四十一條第三款：「經保險人事前審查，非屬醫療必需之診療服務及藥品」，對保險對象所發生不予給付之個別情形，既未就應審查之項目及基準為明文規定，亦與保險對象權益應受保障之意旨有違。至同法第五十一條所謂之醫療費用支付標準及藥價

definiteness of law. The Medical Benefit Regulations, which the relevant authority has the delegated power to promulgate, concern clinical and in-hospital treatments. Among the Regulation Governing the Medical Services Covered under National Health Insurance promulgated on February 24, 1995, there are some provisions that enable the relevant authority to unilaterally change the fundamental rights or obligations concerning the insurance relations. Article 31, Paragraph 2, without any legal provision authorizing a chain of delegation, assigns the insurer the power to define the high technology items and to determine their review procedure. These practices are beyond the scope of statutory delegation. Furthermore, Article 41, Subparagraph 3, which provides: "Treatment and drugs which are not medically necessary according to the pre-examination by the Insurer," does not make explicit the standards and what factors should be considered to determine which items should not be covered in individual cases. This is contrary to the principle protecting the insured's rights and interests. With regard to Article 51 of the same Act concerning

基準，僅係授權主管機關對醫療費用及藥價之支出擬訂合理之審核基準，亦不得以上開基準作為不保險給付範圍之項目依據。上開法律及有關機關依各該規定所發布之函令與本解釋意旨不符部分，均應於本解釋公布之日起兩年內檢討修正。

the so-called standards to determine payment for medical treatments and drugs, its scope is confined to authorizing the relevant authority to set up standards to review the reasonableness of payments for medical treatments and drugs. Those standards should not be invoked to exclude items from insurance coverage. Those laws and administrative rules which are not consistent with this Interpretation should be reviewed and corrected within two years after the promulgation of this Interpretation.

REASONING: According to Article 5 of the National Health Insurance Act, it is obvious that under national health insurance, whenever the insured, insuring entities or contracted medical care institutions contest cases approved by the insurer, the NHI Disputes Review and Settlement Committee set up by the relevant authority has the first jurisdiction over their review, then the insured or insurant entities may file administrative appeals or litigation as remedy, if they do not agree with this Committee's decisions. However, as this case arose before the

解釋理由書：全民健康保險之被保險人、投保單位及保險醫事服務機構對保險人核定之案件發生爭議，應由主管機關所設置之全民健康保險爭議審議委員會先行審議，被保險人及投保單位對爭議案件之審議不服時，其救濟途徑為訴願及行政訴訟程序，此觀全民健康保險法第五條之規定甚明。本件係被保險人對保險人核定醫療給付事項發生爭議，應循上開爭議程序處理，非屬民事事件，惟事件發生於行政訴訟新制施行之前，既經民事確定終局判決，仍予受理解釋，合先說明。

new administrative litigating procedure came into effect and has been finally determined by the civil courts, we will still consider this case, even though this case is concerned with the dispute brought by the insured to contest the medical care benefits approved by the insurer and therefore the administrative procedure mentioned above should apply.

National health insurance, having to do with the welfare of all citizens, is a kind of compulsory social insurance; therefore, the rights or obligations relating to the insurance should be clearly defined and regulated by the doctrine of legal reservation. It is different from commercial insurance, whose contents have largely been determined by contracting parties. If the enabling statute stipulates the supplementation of its rules in regulations on the contents of the insurance relationship, the stipulation should be concrete and clear and should be foreseeable by the insured. Furthermore, if the enabling statute delegates to the relevant authority the promulgation of regulations according to some specified procedure to fill the gaps in the

全民健康保險為強制性之社會保險，攸關全體國民之福祉至鉅，故對於因保險所生之權利義務應有明確之規範，並有法律保留原則之適用，與商業保險之內容主要由當事人以契約訂定者有別。若法律就保險關係之內容授權以命令為補充規定者，其授權應具體明確，且須為被保險人所能預見。又法律授權主管機關依一定程序訂定法規命令以補充法律規定不足者，該機關即應予以遵守，不得捨法規命令不用，而發布規範行政體系內部事項之行政規則為之替代。倘法律並無轉委任之授權，該機關即不得委由其所屬機關逕行發布相關規章。

statute, the agency should abide by this procedure—it should? avoid the form of regulations with administrative rules which have validity only within the administrative organization to substitute for the regulations. If the enabling statute does not provide for further delegation, the agency cannot delegate its subordinate agencies to promulgate those related rules.

The legislative purpose of Article 39 of the National Health Insurance Act, which concerns the items not covered by national health insurance, is to clearly define the limits of coverage. Accordingly, except for those uncovered items which are listed in Subparagraphs 1-11 of the same Article, the relevant authority, when it implements Subparagraph 12, which provides: "other treatments and drugs promulgated by the relevant authority not to be covered," should consider the legislative purposes of similar Subparagraphs of the same Article to ex ante indicate those medical services and drugs which are not covered. The relevant authority cannot avoid application of this Subparagraph and promulgate other exception

全民健康保險法第三十九條係就不在全民健康保險給付範圍之項目加以規定，其立法用意即在明確規範給付範圍，是除該條第一款至第十一款已具體列舉不給付之項目外，依同條第十二款規定：「其他經主管機關公告不給付之診療服務及藥品」，主管機關自應參酌同條其他各款相類似之立法意旨，對於不給付之診療服務及藥品，事先加以公告，尚不能捨棄該款而發布規章另作其他不為給付之除外規定。若為避免醫療資源之濫用或基於醫藥科技之發展，認上開法律第三十九條第十二款之規定仍有不足，自得於法律中增訂或另立具體明確之授權條款，以應實際需要並符法律保留原則。

rules to list uncovered items. If it is deemed that the provisions of Article 39, Subparagraph 12, are not sufficient to prevent the abuse of medical resources or to accommodate the developments in medical or pharmaceutical technology, power-conferring clauses with concreteness and clarity may be added to the enabling statute, which should be both responsive to practical needs and consistent with the doctrine of legal reservation.

Article 31 of the same act provides that: "In case of illness, injury, or maternity of the beneficiary, the contracted medical care institutions shall provide ambulatory or hospital care pursuant to the Medical Benefit Regulations of this Insurance. Physicians may deliver prescriptions to the beneficiary to be dispensed by the pharmacy." "The Medical Benefit Regulations mentioned in the preceding paragraph shall be drafted by the relevant authority and submitted to the Executive Yuan for approval before promulgation." "The delivery of medication, referred to in Paragraph 1, shall be made in accordance with Article 102 of

全民健康保險法第三十一條規定：「保險對象發生疾病、傷害或生育事故時，由保險醫事服務機構依本保險醫療辦法，給予門診或住院診療服務；醫師並得交付處方箋予保險對象至藥局調劑。」「前項醫療辦法，由主管機關擬訂，報請行政院核定後發布之。」「第一項藥品之交付，依藥事法第一百零二條之規定辦理。」內容指涉廣泛，有違法律明確性原則，其授權相關機關所訂定之全民健康保險醫療辦法，應屬關於門診或住院診療服務之事項。行政院衛生署八十四年二月二十四日訂定發布之全民健康保險醫療辦法第三十一條第一項：「特約醫院執行高科技診療項目，應事前報經保險人審查同意，始得

the Pharmaceutical Affairs Act." The content of this article is too broad to be consistent with the principle of clarity and definiteness of law. Article 31, Paragraph 1, of the Regulation Governing the Medical Services Covered under National Health Insurance promulgated by the Department of Health, Executive Yuan, on February 24, 1995, provides that: "To perform medical treatments involving high technology, contracted hospitals should ex ante obtain approval from the insurer." The following paragraph provides that: "the high technology items and reviewing process of the preceding paragraph shall be determined by the insurer." Paragraph 1 enables the relevant authority to unilaterally change the fundamental rights or obligations concerning the insurance relations (Article 20 of the Regulation as amended December 29, 2000, has the same stipulation). Paragraph 2, without any legal provision authorizing a chain of delegation, assigns the insurer the power to define the items concerning high technology and to determine their review procedure. These practices are beyond the scope of statutory delegation. Further-

為之。」第二項：「前項高科技診療項目及審查程序，由保險人定之。」其第一項涉及主管機關片面變更保險關係之基本權利義務（八十九年十二月二十九日修正發布之全民健康保險醫事服務機構醫療服務審查辦法第二十條規定亦同），其第二項在法律無轉委任之授權下，逕將高科技診療項目及審查程序，委由保險人定之，均已逾越母法授權範圍。另同法第四十一條第三款：「經保險人事前審查，非屬醫療必需之診療服為之。」第二項：「前項高科技診療項目及審查程序，由保險人定之。」其第一項涉及主管機關片面變更保險關係之基本權利義務（八十九年十二月二十九日修正發布之全民健康保險醫事服務機構醫療服務審查辦法第二十條規定亦同），其第二項在法律無轉委任之授權下，逕將高科技診療項目及審查程序，委由保險人定之，均已逾越母法授權範圍。另同法第四十一條第三款：「經保險人事前審查，非屬醫療必需之診療服務及藥品」，對保險對象所發生不予給付之個別情形，既未就應審查之項目及基準為明文規定，又不問有無採取緊急救濟之必要，一律限於事前審查，亦與保險對象權益應受保障之意旨有違。至同法第五十條第一項：「保險醫事服務

more, Article 41, Subparagraph 3, which provides: “other treatments and drugs promulgated by the relevant authority not to be covered,” not only does not make explicit the standard and what factors should be considered to determine which items should not be covered in individual cases, but also universally requires ex ante approval without taking account of emergency treatments. This is contrary to the principle protecting the insured’s rights and interests. Article 50, Paragraph 1, provides that: “The contracted medical care institutions shall declare to the insurer the points of the medical services rendered and expense of drugs, based on the Fee Schedule for Medical Services and the Reference List for Drugs.” Article 51, Paragraph 1, provides that: “The Fee Schedule for Medical Services and Reference List for Drugs shall be established jointly by the insurer and the contracted medical care institutions and reported to the relevant authority for approval.” Although the purpose of the provisions is to authorize the relevant authority, for the sake of rationally allocating medical resources, to set up reasonable standards to

機構應依據醫療費用支付標準及藥價基準，向保險人申報其所提供醫療服務之點數及藥品費用。」第五十一條第一項：「醫療費用支付標準及藥價基準，由保險人及保險醫事服務機構共同擬訂，報請主管機關核定。」雖係顧及醫療資源合理分配，授予主管機關對醫療費用及藥價之支出，擬訂合理之審核基準，尚不得以上開基準作為不保險給付範圍之項目依據。按特殊診療項目及藥材，包括所謂危險性高的醫療服務、易為醫療人員不當或過度使用之醫療服務、高科技診療項目、特殊原因之醫療服務、價格昂貴或有明顯副作用之藥物，法律（醫療法、藥事法等）均有規範，主管機關已知之甚稔，不難純就全民健康保險特殊診療項目及藥材給付範圍，諸如：醫療費用支付標準、藥事服務項目及藥價基準等，以法律或法律具體明確授權條款預為規定，並加以事前公告。若由法律籠統授權之法規命令，以高科技診療項目、高危險醫療服務等，就保險給付加以排除，已有未合，況由未經法律明確授權而任由所屬機關發布規範行政體系內部事項之行政規則，諸如：全民健康保險特殊診療項目及藥材事前審查作業要點（中央健康保險局八十六年一月十一日修正公告）、

review costs of medical treatments and drugs, these provisions should not be interpreted as the basis for items excluded from insurance coverage. Those special medical treatments and drugs, such as so-called high-risk medical services, medical services easily abused or overused by medical staff, high-technology items, medical services for special causes, expensive drugs or drugs with serious side effects, have already been regulated by laws (See the Medical Service Act, Pharmaceutical Affairs Act, etc.). The relevant authority knows that it would not be difficult to directly write into law or indirectly delegate with concreteness and clarity to publish ex ante the scopes and items for special cases in national health insurance, such as reimbursement standards for medical expenses, items of pharmaceutical service, and the basis for pricing drugs. The statutory regulations, which do not have clear and concrete delegation based on the enabling law, having excluded high technology and high risk medical services from insurance coverage, therefore, run counter to law. Moreover, subordinate agencies, without clear dele-

全民健康保險高科技診療項目及審查程序作業要點（中央健康保險局八十五年十一月十三日公告）為之替代，於法律保留原則尤屬有違。上開法律及有關機關依各該規定所發布之函令與本解釋意旨不符部分，均應於本解釋公布之日起兩年內檢討修正。又本院釋字第四七二號解釋所釋各項，迄今已逾二年，未見有所措置，於本次修正時，亦應一併注意及之，特此指明。

gation, promulgate administrative rules which have validity only within administrative organizations, such as the Operational Guidelines Governing the Preapproval of Specific Diagnostic Items and Medications for National Health Insurance (as amended and promulgated on January 11, 1997, by the Bureau of National Health Insurance) and the Operational Guidelines Governing the Preapproval of High Technological Diagnostic Items for National Health Insurance (promulgated on November 13, 1996, by the Bureau of National Health Insurance), that take the place of statutory regulations. This definitely is in violation of the doctrine of legal reservation. Those laws and administrative rules which are not consistent with this Interpretation should be reviewed and corrected within two years after the promulgation of this Interpretation. Moreover, those omissions which were pointed out in this Council's Interpretation No. 472 more than two years ago should also have been taken into account in this correction since they have not yet been properly handled.

Justice Vincent Sze filed dissenting opinion in part.

Justice Sen-Yen Sun filed dissenting opinion in part.

本號解釋施大法官文森、孫大法官森焱分別提出部分不同意見書。

J. Y. Interpretation No.525（May 4, 2001）*

ISSUE: The directive issued by the Ministry of Civil Service repealed its previous directives extending credit provisions originally designed and intended for reserve military personnel taking the transfer examination for public office to the military reserve personnel who had voluntarily served as military officers for four years. Does the said directive violate the constitutional principle of legitimate expectation, thus being null and void?

RELEVANT LAWS:

Articles 119, 120 and 126 of the Administrative Procedure Act（行政程序法第一百十九條、第一百二十條及第一百二十六條）; Article 3, Subparagraph 1, of the Act Governing the Replacement Test of the Reserve Military Personnel for Civil Positions（後備軍人轉任公職考試比敘條例第三條第一款）; Ministry of Civil Service Ordinance No.97055 of June 4, 1987, Ordinance No.1152248 of June 6, 1995, Ordinances No.35064 of November 15, 1975（銓敘部七十六年六月四日台華甄四字第九七〇五五號函，八十四年六六日台中審字第一一五二二四八號函，六十四年十一月十五日台謨甄四字第三五〇六四號函）; Article 48 (3) of the Tax Levy Act（稅捐稽徵法第四十八條之三）.

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* Translated by Wei-Feng Huang of THY Taiwan International Law Offices.

** Contents within frame, not part of the original text, are added for reference purpose only.

KEYWORDS:

rescission or repeal (cancellation or abolishment)（撤銷或廢止）, principle of legitimate expectation（信賴保護原則）, administrative act（行政處分）, credit provisions（比敘條例）, empowering administrative act（受益行政處分）, military reserve personnel（後備軍人）, ranked military officers（常備軍官）, reserve military officers（預備軍官）, measures of remediation（補救措施）, transition period（過渡期間）, administrative regulation（行政法規）, objective（客觀）.**

HOLDING: The principle of legitimate expectation *(Vertrauenschutzprinzip)* concerns the protection of the people's right under the Constitution. When the public authorities' exercise of power necessitates protection of the people's legitimate expectations, such exercise of power is not abridged by the cancellation or abolishment of the administrative ordinances which grant benefits to their subjects (See Articles 119, 120 and 126 of the Administrative Procedure Act); that is, the authorities shall continue to take into consideration the protection of the people's legitimate expectations de-

解釋文：信賴保護原則攸關憲法上人民權利之保障，公權力行使涉及人民信賴利益而有保護之必要者，不限於授益行政處分之撤銷或廢止（行政程序法第一百十九條、第一百二十條及第一百二十六條參照），即行政法規之廢止或變更亦有其適用。行政法規公布施行後，制定或發布法規之機關依法定程序予以修改或廢止時，應兼顧規範對象信賴利益之保護。除法規預先定有施行期間或因情事變遷而停止適用，不生信賴保護問題外，其因公益之必要廢止法規或修改內容致人民客觀上具體表現其因信賴而生之實體法上利益受損害，應採取合理之補救措施，或訂定過渡期間

spite abolishment of or amendment to the said regulations. Once an administrative ordinance is proclaimed effective, the authority responsible for drafting or proclaiming such regulation shall protect the legitimate expectations of subjects affected by the regulation when seeking to amend or abolish such regulation pursuant to legal procedures. So unless the regulation has a predetermined period for application or there is a change of circumstance which leads to its ineffectiveness, in which instance there is no legitimate expectation, authorities seeking to abolish or amend the regulation for public interest, to the effect that such action abridges the privileges of those who had a legitimate expectation of enjoying these privileges, shall provide reasonable measures of remediation or transition period clauses with a view to minimize loss, thus complying with the Constitution's objective to protect the people's rights. The expectations of regulations that have been abolished or amended, that materially infringe upon the empowering statutes, or of regulations (for example, explanatory or determinative administrative rules) that are

之條款，俾減輕損害，方符憲法保障人民權利之意旨。至經廢止或變更之法規有重大明顯違反上位規範情形，或法規（如解釋性、裁量性之行政規則）係因主張權益受害者以不正當方法或提供不正確資料而發布者，其信賴即不值得保護；又純屬願望、期待而未有表現其已生信賴之事實者，則欠缺信賴要件，不在保護範圍。

proclaimed based on information obtained through improper means or incorrect information provided by the aggrieved are not legitimate and thus shall not be protected; moreover, mere hope or expectation without any action in reliance of such expectation lacks the element of legitimate expectation and is outside the scope of protection.

The Ministry of Civil Service Ordinance No.97055 of June 4, 1987, extended the application of Article 3, Subparagraph 1, of the Act Governing the Replacement Test of the Reserve Military Personnel for Civil Positions, which applied to ranked military officers only, to military reserve personnel who had voluntarily served as military officers for four years. The Ordinance is in conflict with the legislative intentions of the abovementioned Act, and the said Ministry stipulated in Ordinance No.1152248 of June 6, 1995, that: "This Ministry's Ordinances No.35064 of November 15, 1975, and No.97055 of June 4, 1987, which apply the Act Governing the Replacement Test of the Reserve Military Personnel for

銓敘部中華民國七十六年六月四日七六台華甄四字第九七〇五五號函將後備軍人轉任公職考試比敘條例第三條第一款適用對象常備軍官，擴張及於志願服四年預備軍官現役退伍之後備軍人，有違上開條例之意旨，該部乃於八十四年六月六日以八四台中審一字第一一五二二四八號函釋規定：「本部民國六十四年十一月十五日六四台謨甄四字第三五〇六四號函暨七十六年六月四日七六台華甄四字第九七〇五五號函，同意軍事學校專修班畢業服預備軍官役及大專畢業應召入伍復志願轉服四年制預備軍官役依法退伍者，比照『後備軍人轉任公職考試比敘條例』比敘相當俸級之規定，自即日起停止適用」，未有過渡期間之設，可能導致服役期滿未及參加考試，比敘規定已遭取銷之情形，衡

Civil Positions and its provisions in relation to remunerations to active-duty military officers who have graduated from special military colleges and college graduates who have volunteered to serve for four years as military officers, shall no longer be applied from this date." The aforementioned Ordinance provides no transition period, thus military personnel who have served their term of office but have not taken the examination may be denied the credit provisions under the Act. However, no administrative ordinance should be expected to be of perpetual application; thus, subjects to which the regulations apply must meet the requirement of legitimate expectation by satisfying the objective test of acting in reliance of their expectations during the application period in order to fall within the protection. Although the aforementioned Ordinance of June 4, 1987, by the Ministry of Civil Service may be a foundation for legitimate expectation, it cannot be said that all people who have served the required four-year military service will enjoy the benefit of the examination and credit provisions irrespective of the abolishment of the

諸首開解釋意旨固有可議。惟任何行政法規皆不能預期其永久實施，受規範對象須已在因法規施行而產生信賴基礎之存續期間，對構成信賴要件之事實，有客觀上具體表現之行為，始受信賴之保護。前述銓敘部七十六年六月四日函件雖得為信賴之基礎，但並非謂凡服完四年預備軍官役者，不問上開規定是否廢止，終身享有考試、比敘之優待，是以在有關規定停止適用時，倘尚未有客觀上具體表現信賴之行為，即無主張信賴保護之餘地。就本件而言，其於比敘優待適用期間，未參與轉任公職考試或取得申請比敘資格者，與前述要件不符。主管機關八十四年六月六日之函釋停止適用後備軍人轉任公職考試比敘條例有關比敘之規定，符合該條例之意旨，不生牴觸憲法問題。

abovementioned Act. Therefore if there is no objective manifestation of reliance at the time the relevant regulation ceases its operation, then there can be no claim of legitimate expectation. Regarding the case at hand, since the applicant had not taken any transfer examination for public office or applied for credit during the operation period of the credit provisions, the aforementioned requirement had not been satisfied. The relevant authority's Ordinance of June 6, 1995, which declared inapplicable the credit provisions of the Act Governing the Replacement Test of the Reserve Military Personnel for Civil Positions complies with the intent of the said Act and does not infringe upon the Constitution.

REASONING: A state governed by the rule of law *(Rechtsstaat)* is one of the fundamental principles of the Constitution. The paramount principle of a state governed by the rule of law *(Rechtsstaat)* is the protection of the people's rights, maintenance of legal order and adherence to the principles of honesty and goodwill. The people's legitimate reliance on the

解釋理由書：法治國為憲法基本原則之一，法治國原則首重人民權利之維護、法秩序之安定及誠實信用原則之遵守。人民對公權力行使結果所生之合理信賴，法律自應予以適當保障，此乃信賴保護之法理基礎，亦為行政程序法第一百十九條、第一百二十條及第一百二十六條等相關規定之所由設。行政法規（包括法規命令、解釋性或裁量性

results of public authorities' exercise of power shall be properly protected by the law; such is the rationale of the principle of legitimate expectation *(Vertrauen-schutzprinzip)* and the legislative intention behind provisions such as Articles 119, 120 and 126 of the Administrative Procedure Act. The effect of the abolishment or amendment of administrative regulations (including ordinances and explanatory or determinative administrative rules) is no less than the cancellation or abolishment of administrative acts under the above-mentioned Administrative Procedure Act. So except when the regulation has a pre-determined application period or the authority determines it should cease application due to a change of circumstance, in which instance there is no legitimate expectation, the authority responsible for drafting or proclaiming a regulation may amend or abolish it pursuant to legal procedures, but shall take into consideration and provide proper guarantee to the subject's legitimate privileges, in order to comply with the constitutional objective of protecting the people's rights.

行政規則）之廢止或變更，於人民權利之影響，並不亞於前述行政程序法所規範行政處分之撤銷或廢止，故行政法規除預先定有施行期間或經有權機關認定係因情事變遷而停止適用，不生信賴保護問題外，制定或發布法規之機關固得依法定程序予以修改或廢止，惟應兼顧規範對象值得保護之信賴利益，而給予適當保障，方符憲法保障人民權利之意旨。

The rulemaking or proclamation authority may abolish or amend regulations according to legal procedures and for reasons of public interests, that is, the interests of the society as a whole in preference to the interests of individuals to which the regulation applies. In the event the people have relied on the effectiveness of the said regulations to their detriment and the existing regulations offer no remediation provisions (such as Article 48 (3) of the Tax Levy Act), the rulemaking or proclamation authority should adopt reasonable remediation measures or transition period clauses in order to protect such legitimate expectation of the people and to minimize loss. However, the principle of legitimate expectation does not apply to any of the following circumstances: (1) regulations that have been abolished or amended that materially infringe upon the empowering statutes; (2) the relevant regulations (for example, explanatory or determinative administrative rules) that are proclaimed based on information obtained through improper means or incorrect information provided by the aggrieved which are defective and unworn-

制定或發布法規之機關基於公益之考量，即社會整體利益優先於法規適用對象之個別利益時，自得依法定程序停止法規適用或修改其內容，若因此使人民出於信賴先前法規繼續施行，而有因信賴所生之實體法上利益受損害者，倘現有法規中無相關補救規定可資援用時（如稅捐稽徵法第四十八條之三等），基於信賴之保護，制定或發布法規之機關應採取合理之補救措施或訂定過渡期間之條款，俾減輕損害。至有下列情形之一時，則無信賴保護原則之適用：一、經廢止或變更之法規有重大明顯違反上位規範情形者；二、相關法規（如各種解釋性、裁量性之函釋）係因主張權益受害者以不正當方法或提供不正確資料而發布，其信賴顯有瑕疵不值得保護者；三、純屬法規適用對象主觀之願望或期待而未有表現已生信賴之事實者，蓋任何法規皆非永久不能改變，法規未來可能修改或廢止，受規範之對象並非毫無預見，故必須有客觀上具體表現信賴之行為，始足當之。至若並非基於公益考量，僅為行政上一時權宜之計，或出於對部分規範對象不合理之差別對待，或其他非屬正當之動機而恣意廢止或限制法規適用者，受規範對象之信賴利益應受憲法之保障，乃屬當然。

thy of protection; or (3) the mere hope or expectation of the subjects, to whom the regulations apply, without any action in reliance of such expectation. No regulation is perpetual in its application, and the fact that regulations may be amended or abolished in the future is foreseeable by subjects to whom they apply, therefore the subjects must meet the requirement of legitimate expectation by satisfying the objective test of acting in reliance of their expectations. Conversely, if regulations are abolished or restricted in their application for the convenience of administration rather than based on public interests, or there is unreasonable preferential treatment of some subjects or the motive for such action is improper, the interests of subjects to whom the regulations apply shall definitely be protected by the Constitution.

The Ministry of Civil Service Ordinance No.97055 of June 4, 1987, extended the application of Article 3, Subparagraph 1, of the Act Governing the Replacement Test of the Reserve Military Personnel for Civil Positions, which ap-

銓敘部中華民國七十六年六月四日七六台華甄四字第九七〇五五號函將後備軍人轉任公職考試比敘條例第三條第一款適用對象常備軍官，擴張及於志願服四年預備軍官現役退伍之後備軍人，有違上開條例之意旨，該部乃於八

plied to ranked military officers only, to military reserve personnel who had voluntarily served as military officers for four years. The Ordinance is in conflict with the legislative intentions of the abovementioned Act, and the said Ministry stipulated in Ordinance No.1152248 of June 6, 1995, that: "This Ministry's Ordinances No.35064 of November 15, 1975, and No.97055 of June 4, 1987, which apply the Act Governing the Replacement Test of the Reserve Military Personnel for Civil Positions and its provisions in relation to remunerations to active-duty military officers who graduated from special military colleges and college graduates who have volunteered to serve for four years as military officers, shall cease its application from this date." Regardless of whether the Ministry's Ordinance of June 4, 1987, infringes upon the provisions of the abovementioned Act, interest in the preservation of an open and competitive examination system stipulated by the Constitution and of the credit system of ordinary civil officials is apparently greater than the granting of special benefits to certain military officers who have

十四年六月六日以八四台中審一字第一一五二二四八號函釋規定：「本部民國六十四年十一月十五日六四台謨甄四字第三五〇六四號函暨七十六年六月四日七六台華甄四字第九七〇五五號函，同意軍事學校專修班畢業服預備軍官役及大專畢業應召入伍復志願轉服四年制預備軍官役依法退伍者，比照『後備軍人轉任公職考試比敘條例』比敘相當俸級之規定，自即日起停止適用」。姑不論銓敘部七十六年六月四日之函件，是否牴觸前開條例規定，維護憲法所揭示公開競爭考試制度及法律所定正常文官甄補管道，其利益顯然優於對少數延長役期預備軍官賦予之特殊優待，該部八十四年六月六日之函釋停止七十六年規定之適用，未有過渡期間之設，可能導致服役期滿未及參加考試、比敘規定已遭取銷之情形，固有可議之處，要屬符合公益之措施。銓敘部七十六年六月四日發布之上開函件，雖得為信賴之基礎，惟係基於招募兵員之權宜措施，與法律之規定既不一致，自不能預期其永久實施，除已有客觀上具體表現信賴之行為者外，尚不能因比敘措施廢止即主張其有信賴利益之損失。就本件而言，參與轉任公職考試或取得申請比敘資格，乃表現其服役之初即對應考試服公職可獲

served a longer term of service. The Ministry's Ordinance of June 6, 1995, which declared ineffective its Ordinance of 1987 provides no transition period which may lead to the result that military personnel who have served their term of office but have not taken the examination may be denied the credit provisions under the Act. Although the appropriateness of such an Ordinance may be arguable, it is a measure in furtherance of the public interest. The Ministry of Civil Service Ordinance of June 4, 1987, though it may be a basis for legitimate expectation, is only an expedient measure for recruiting military personnel, and since it is incompatible with statutory provisions, it cannot be expected to have perpetual application—even individuals who have acted in reliance of their legitimate expectation cannot assert that they have suffered loss due to their reliance on the termination of such measure. Regarding the case at hand, sitting for a transfer examination or applying for a credit qualification are objective acts manifesting reliance on the benefits of the credit provisions at the commencement of military service. Therefore, if the appli-

優待具有信賴之客觀具體行為。是以於停止適用時，尚未應考試及格亦未取得公務人員任用資格者（本件聲請人遲至八十六年始應特種考試後備軍人轉任公務人員考試及格），難謂法規廢止時已有客觀上信賴事實之具體表現，即無主張信賴保護之餘地。主管機關八十四年六月六日之函釋停止適用後備軍人轉任公職考試比敘條例有關比敘之規定，符合該條例之意旨，不生牴觸憲法問題。

cant had not passed the examination nor obtained qualification for a public office upon the cessation of application of the credit provisions (the applicant in this case did not pass the special examination for military reserve personnel to transfer to public office until 1997), it cannot be said that there was objective manifestation of reliance when the regulations were abolished, hence no protection was guaranteed. The Ordinance of June 6, 1995, by the relevant authority, which abolished the credit provisions under the Act Governing the Replacement Test of the Reserve Military Personnel for Civil Positions is consistent with the legislative intention of the Act and does not infringe upon the Constitution.

Justice Tieh-Cheng Liu filed dissenting opinion.

本號解釋劉大法官鐵錚提出不同意見書。

J. Y. Interpretation No.526（June 1, 2001）*

ISSUE: Does the exclusion of the pre-reorganization creditable service of the employees of the Commission for Economic Planning and Development of the Executive Yuan and other similar cases from the application of the Regulation Regarding Supplementary Compensation for Government Employees and Teachers' Pension and other Cash Benefits violate the constitutional principle of equality and protection of property right?

RELEVANT LAWS:

Articles 7 and 15 of the Constitution（憲法第七條、第十五條）; Article 8, Paragraph 2, of the Public Functionaries Retirement Act (pre-January 20, 1993)（八十二年一月二十日前修正公務人員退休法第八條第二項）; Regulation Regarding Supplementary Compensation for Government Employees and Teachers' Pension and other Cash Benefits（公教人員退休金其他現金給與補償金發給辦法）.

KEYWORDS:

property right（財產權）, principle of equality（平等原則）, supplementary compensation for pension and other cash benefits（退休金其他現金給與補償金）.**

HOLDING: The Regulation Regarding Supplementary Compensation for

解釋文：考試院、行政院中華民國八十四年十月十七日會同發布之公

* Translated by Professor S.M. Yu.

** Contents within frame, not part of the original text, are added for reference purpose only.

Government Employees and Teachers' Pension and other Cash Benefits promulgated jointly by the Examination and Executive Yuans on October 17, 1995, is applicable to the supplementary compensation for pension of ordinary public functionaries and teachers. As regards the pre-reorganization employees of the Commission for Economic Planning and Development of the Executive Yuan, and other similar cases, their procedures for appointment and remuneration system are totally different from those of ordinary public functionaries. For this reason, the abovementioned Regulation is not applicable, except for the creditable service during the period of reorganization up to June 30, 1995, to such pre-reorganization employees. The Ministry of Civil Service Letter (85) Tai- Chung-Te (2) No. 1344172 dated August 15, 1996, states that only the creditable service during the period of reorganization from January 9, 1985, to June 30, 1995, of the employees of the Commission for Economic Planning and Development of the Executive Yuan is eligible for compensation under the abovementioned Regulation. The pre-

教人員退休金其他現金給與補償金發給辦法，係適用於一般公教人員之退休金補償事宜。至改制前行政院經濟建設委員會等機關之人員，其任用程序、薪給制度與行政機關之一般公務人員均有不同。是改制前之上開人員，除改制時起至八十四年六月三十日止之年資外，尚無上揭辦法之適用。銓敘部八十五年八月十五日八五台中特二字第一三四四一七二號函，認行政院經濟建設委員會所屬人員自七十四年一月九日改制時起至八十四年六月三十日止之年資，始得依上開辦法發給補償金；至於改制前之年資，因改制時曾領取退休金差額，且所領退休金、撫卹金基數內涵及退休金差額已高出一般公務人員甚多，基於公務人員權益整體平衡之考量，不得再核給補償金等語，符合上開辦法訂定之意旨，與憲法保障財產權之規定亦無牴觸。

reorganization creditable service, due to the receipt of pension differential during reorganization, and the fact that the content of the pension and dependent allowance unit and pension differential received are much higher than ordinary public functionaries, considering the overall balance and equity of government employees' rights and interest, should not be eligible for compensation. Such statement is consistent with the purpose of the above-mentioned Regulation, and the constitutional guarantee of property right.

REASONING: The following factors led to the joint promulgation by the Examination and Executive Yuans on October 17,1995, of the Regulation Regarding Supplementary Compensation for Government Employees and Teachers' Pension and other Cash Benefits: the failure of the government to implement Article 8, Paragraph 2, of the pre-January 20, 1993 Public Functionaries Retirement Act to take into account other cash benefits in calculating pension; to coordinate with the new retirement system effective July 1, 1995, after the amendment of the Public

解釋理由書：考試院、行政院中華民國八十四年十月十七日會同發布之公教人員退休金其他現金給與補償金發給辦法，係因政府未依八十二年一月二十日修正公布前之公務人員退休法第八條第二項規定發給其他現金給與之退休金應發給數額，及為配合自八十四年七月一日起施行修正後之公務人員退休法及公務人員撫卹法之新退撫制度，並參酌立法院八十一年十二月二十九日審議通過修正公務人員退休法時，附帶決議要求主管機關仍應依據未修正前該法第八條第二項訂定其他現金給與補償公務人員，對一般公教人員早期退休金基

Functionaries Retirement Act and the Act Governing the Payment of Compensation to Surviving Dependents of Public Functionaries; and to take into account the supplementary resolution of the Legislative Yuan while amending the Public Functionaries Retirement Act on December 29, 1992, requesting the competent authority nevertheless to pay public functionaries compensation for: other cash benefits "under Article 8, Paragraph 2, of the pre-amendment Public Functionaries Retirement Act as a policy compensation for the fact that "other cash benefit" had not been taken into account in earlier calculations of the pension unit content.

數計算內涵未將「其他現金給與」包含在內所為之政策性補償規定。

Article 7 of the Constitution explicitly protects the right of equality of the people. However, such equality is not a formalistic, absolute or mechanical one, but a substantive protection, under the law, of level playing field for the people. Based on the constitutional value system and the legislative purpose, the promulgating authority of law or regulation may exercise discretion, depending on the nature of the matter regulated, properly

憲法第七條明文保障人民之平等權，惟其平等並非絕對、機械之形式上平等，而係保障人民在法律上地位實質平等，基於憲法之價值體系與立法目的，訂立法規之機關自得斟酌規範事物性質之差異而為合理之區別對待，本院釋字第四八五號解釋闡釋在案。公教人員退休金其他現金給與補償金發給辦法既為特定目的而訂定，僅適用於一般公教人員退休金補償事宜，則行政院經濟建設委員會七十四年一月九日改制前所

categorized and treated accordingly. J. Y. Interpretation No. 485 has already rendered our opinion on the matter. The adoption of the Regulation Regarding Supplementary Compensation for Government Employees and Teachers' Pension and other Cash Benefits is for a specific purpose, applicable only to the pension compensation of ordinary public functionaries and teachers. The pre-January 9, 1985, reorganization employees of the Commission for Economic Planning and Development of the Executive Yuan, being different from ordinary government administrative organization employees in their appointment procedures and remuneration system, have no such thing as "other cash benefits" under their lump-sum salary system. Furthermore, to the extent that their creditable service include pre-reorganization creditable service, such creditable service has been paid off through liquidated differential by the Sino-American Fund, the content of each pension unit being higher than that of ordinary public functionaries. Considering the overall balance and equity of government employees' rights and

屬人員，因其任用程序、薪給制度與行政機關之一般公務人員均有不同，在採單一俸給制度下，本無其他現金給與部分。再其任職年資含有改制前年資者，該項年資因已先由中美基金結算差額發給有案，且所領每一基數之退休金內涵亦較一般公務人員為高，基於公務人員權益整體平衡之考量，改制前之上開非一般公務人員，除改制時起至八十四年六月三十日實施退撫新制前之年資外，自無上揭辦法之適用，方符實質平等之要求。

interests, those pre-reorganization non-ordinary government employees mentioned above, except for the period from the reorganization to the June 30, 1995 implementation of the new retirement system, should not be eligible for the application of the abovementioned Regulation, consistent with the requirement of substantive equality.

As regards the payment of pension and other cash benefits compensation to the Commission of Economic Planning and Development of the Executive Yuan employees, the Ministry of Civil Service stated its position in letter (85) Tai-Chung-Te (2) No. 1344172 dated August 15, 1996, to the effect that only the creditable service during the period of reorganization from January 9, 1985, to June 30, 1995, is eligible for compensation under the abovementioned Measure. Pre-reorganization creditable service, due to the receipt of pension differential, the pension unit content and the pension differential received being well above those of ordinary government employees, is not eligible for compensation. Such statement, being a

關於行政院經濟建設委員會所屬人員之退休金其他現金給與補償金之發給，銓敘部八十五年八月十五日八五台中特二字第一三四四一七二號函，認該會所屬人員具改制前後之年資者，自改制時起至八十四年六月三十日止之年資，始得依上開辦法發給補償金；至於改制前之年資，因改制時曾領取退休金差額，且所領退休金基數內涵及退休金差額顯已高出一般公務人員甚多，不再核給補償金等語，係屬主管機關為執行未盡明確之上開辦法，依其職權所為之必要補充性規定，於原辦法之立法本意無違，與憲法保障人民財產權之規定亦無牴觸。

necessary supplementary provision, based on proper authority, to implement the somewhat ambiguous abovementioned Regulation, is consistent with the purpose of the original Regulation, and not contrary to the constitutional protection of the people's property right.

Justice Geng Wu filed concurring opinion.

本號解釋吳大法官庚提出協同意見書。

J. Y. Interpretation No.527（June 15, 2001）*

ISSUE: May a local administrative agency appoint someone to a statutorily prescribed post prior to the adoption of the organic act of self-government? What are the meanings of the various provisions in respect of the petitions to the Judicial Yuan for interpretations as provided in the Local Government Systems Act?

RELEVANT LAWS:

Article 78 of the Constitution（憲法第七十八條）; Article 5 of the Amendments to the Constitution（憲法增修條文第五條）; Articles 5, 7, 8 and 9 of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第五條、第七條、第八條、第九條）; Articles 28 , 29, 30, 38, 39, 43, 54, 62, 75 and 77 of the Local Government Systems Act（地方制度法第二十八條、第二十九條、第三十條、第三十八條、第三十九條、第四十三條、第五十四條、第六十二條、第七十五條、第七十七條）.

KEYWORDS:

local self-governing body（地方自治團體）, autonomous power of internal organization（自主組織權）, self-governing affairs（自治事項）, self-governing laws and regulations（自治法規）, delegated affairs（委辦事項）, local legislative body（地方立法機關）, local administrative

* Translated by Vincent C. Kuan.

** Contents within frame, not part of the original text, are added for reference purpose only.

agency（地方行政機關）, self-governing statutes（自治條例）, self-governing rules（自治規則）, delegation rules（委辦規則）, administrative litigation（行政訴訟）, estoppel（禁反言）.**

HOLDING: 1. A local self-governing body shall have the autonomous power of internal organization and the authority to formulate rules and regulations in respect of self-governing affairs and implement the same on the premise that such power and authority are subject to the Constitution and the laws. The organization of a local self-governing body and its subdivisions shall be prescribed by the local legislative body by means of drawing up self-governing statutes respecting such organization based on the guidelines formulated by the central competent authority, which is unambiguously set forth in Articles 28 (iii), 54 and 62 of the Local Government Systems Act. Upon the promulgation and implementation of the said Act, the establishment of any and all organs and positions of a self-governing body shall follow the aforesaid procedure.

解釋文：一、地方自治團體在受憲法及法律規範之前提下，享有自主組織權及對自治事項制定規章並執行之權限。地方自治團體及其所屬機關之組織，應由地方立法機關依中央主管機關所擬訂之準則制定組織自治條例加以規定，復為地方制度法第二十八條第三款、第五十四條及第六十二條所明定。在該法公布施行後，凡自治團體之機關及職位，其設置自應依前述程序辦理。惟職位之設置法律已有明確規定，倘訂定相關規章須費相當時日者，先由各該地方行政機關依地方制度法相關規定設置並依法任命人員，乃為因應業務實際需要之措施，於過渡期間內，尚非法所不許。至法律規定得設置之職位，地方自治團體既有自主決定設置與否之權限，自應有組織自治條例之依據方可進用，乃屬當然。

However, where the establishment of a position has been clearly prescribed by law, it is not against the law for the respective local administrative agencies to establish and appoint relevant personnel pursuant to the applicable provisions of the Local Government Systems Act for the practical purpose of handling their business on an interim basis, if it will take a considerable amount of time to formulate relevant rules and regulations. As for such positions as may be established by law, a self-governing body shall, as a matter of course, appoint and employ relevant personnel under applicable organic self-governing statutes since the self-governing body has the discretionary power to determine whether or not such positions will be established.

2. Article 43-I through -III of the Local Government Systems Act provides that any and all resolutions passed by local legislative bodies at various levels regarding self-governing affairs, as well as any and all self-governing laws and regulations described in Article 30-I through -IV of the said Act, that are in conflict with

二、地方制度法第四十三條第一項至第三項規定各級地方立法機關議決之自治事項，或依同法第三十條第一項至第四項規定之自治法規，與憲法、法律、中央法規或上級自治團體自治法規牴觸者無效。同法第四十三條第五項及第三十條第五項均有：上述各項情形有無牴觸發生疑義得聲請司法院解釋之規

the Constitution, laws, central rules and regulations, or self-governing laws and regulations promulgated by a superior self-governing body, shall be null and void. Articles 43-V and 30-V both provide to the effect that, when doubt arises as to whether or not there is a conflict under the aforesaid circumstances, petitions for interpretations thereon may be filed with the Judicial Yuan. The said provisions are intended to refer to such circumstances where the competent authority at various levels in charge of the supervision of self-governing bodies concerning relevant affairs still has doubts as to whether a particular resolution or self-governing statute is in conflict with the Constitution, the laws or any other superior legal norm, and thus has filed a petition for interpretation with this Court instead of forthrightly declaring such resolution or self-governing statute as null and void pursuant to Paragraph V of the respective articles. If a local self-governing body has different opinions as to the contents that are declared null and void, it may, depending on whether the subject matter that is declared null and void is a self-governing statute or

定，係指就相關業務有監督自治團體權限之各級主管機關對決議事項或自治法規是否牴觸憲法、法律或其他上位規範尚有疑義，而未依各該條第四項逕予函告無效，向本院大法官聲請解釋而言。地方自治團體對函告無效之內容持不同意見時，應視受函告無效者為自治條例抑自治規則，分別由該地方自治團體之立法機關或行政機關，就事件之性質聲請本院解釋憲法或統一解釋法令。有關聲請程序分別適用司法院大法官審理案件法第八條第一項、第二項之規定，於此情形，無同法第九條規定之適用。至地方行政機關對同級立法機關議決事項發生執行之爭議時，應依地方制度法第三十八條、第三十九條等相關規定處理，尚不得逕向本院聲請解釋。原通過決議事項或自治法規之各級地方立法機關，本身亦不得通過決議案又同時認該決議有牴觸憲法、法律、中央法規或上級自治團體自治法規疑義而聲請解釋。

self-governing rule, file a petition with this Court for constitutional interpretation or uniform interpretation of laws or regulations through its legislative body or administrative organ, respectively, based on the nature of the matter at issue. Article 8-I and -II, respectively, of the Constitutional Interpretation Procedure Act shall apply to the procedure for filing the aforesaid petitions, whereas the provisions of Article 9 thereof shall not be applicable under such circumstances. Where there is any dispute between the local administrative agency and the legislative body at the same level in respect of the enforcement of a resolution passed by the said legislative body, it shall be resolved in accordance with the applicable provisions of Articles 38 and 39 of the Local Government Systems Act, but not through petitions with this Court for interpretations. In addition, a local legislative body that passed a resolution or self-governing rule or regulation may not file a petition for interpretation on the ground that it has doubts as to whether the originally passed resolution is in conflict with the Constitution, laws, central rules and regulations, or

self-governing laws and regulations promulgated by a superior self-governing body.

3. If the competent authority at various levels in charge of the supervision of local self-governing bodies, when it has any doubt as to whether the administrative agency of a local self-governing body (namely, the government of a municipality under direct jurisdiction of the Executive Yuan, a county or city, or office of a township, town or city), in handling a particular self-governing affair under Paragraphs II, IV and VI of Article 75 of the Local Government Systems Act, violates the Constitution, the laws or any other superior legal norm, does not revoke, amend, repeal or suspend the implementation of same pursuant to the respective provisions of said paragraphs, it may file a petition for interpretation with this Court according to Paragraph VIII of said Article. Where the administrative agency of a local self-governing body believes that the disposition made by the aforesaid competent authority concerns the validity of a self-governing law or regulation based on

三、有監督地方自治團體權限之各級主管機關，依地方制度法第七十五條對地方自治團體行政機關（即直轄市、縣、市政府或鄉、鎮、市公所）辦理該條第二項、第四項及第六項之自治事項，認有違背憲法、法律或其他上位規範尚有疑義，未依各該項規定予以撤銷、變更、廢止或停止其執行者，得依同條第八項規定聲請本院解釋。地方自治團體之行政機關對上開主管機關所為處分行為，認為已涉及辦理自治事項所依據之自治法規因違反上位規範而生之效力問題，且該自治法規未經上級主管機關函告無效，無從依同法第三十條第五項聲請解釋，自治團體之行政機關亦得依同法第七十五條第八項逕向本院聲請解釋。其因處分行為而構成司法院大法官審理案件法第五條第一項第一款之疑義或爭議時，則另得直接聲請解釋憲法。如上述處分行為有損害地方自治團體之權利或法律上利益情事，其行政機關得代表地方自治團體依法提起行政訴訟，於窮盡訴訟之審級救濟後，若仍發生法律或其他上位規範違憲疑義，而合

which self-governing affairs are handled that may be in conflict with a superior legal norm, but a petition for interpretation may not be made pursuant to Article 30-V of the said Act because the self-governing law or regulation at issue is not declared by the competent authority as null and void, the administrative agency of a self-governing body may directly file a petition for interpretation with this Court in accordance with Article 75-VIII of the said Act. If the disposition at issue leads to a doubt or dispute contemplated by Article 5-I (i) of the Constitutional Interpretation Procedure Act, a petition for constitutional interpretation may be otherwise made thereunder. If the aforesaid disposition infringes upon the rights or legal interests of a local self-governing body, the administrative agency thereof may, on behalf of the local self-governing body, file an administrative litigation pursuant to law. If doubt remains as to whether a law or any other superior legal norm is unconstitutional after any and all remedies through litigation procedures at all levels are exhausted, a petition for interpretation may nonetheless be made with this Court

於司法院大法官審理案件法第五條第一項第二款之要件，亦非不得聲請本院解釋。至若無關地方自治團體決議事項或自治法規效力問題，亦不屬前開得提起行政訴訟之事項，而純為中央與地方自治團體間或上下級地方自治團體間之權限爭議，則應循地方制度法第七十七條規定解決之，尚不得逕向本院聲請解釋。

if the requirements of Article 5-I (ii) of the Constitutional Interpretation Procedure Act are met. As for those issues neither concerning the validity of a resolution or self-governing statute of a local self-governing body, nor respecting matters for which an administrative litigation may be filed, but instead involving a dispute on the authority between the central government and a local self-governing body, or between local self-governing bodies at different levels, they shall be resolved in accordance with Article 77 of the Local Government Systems Act and thus no petition may be forthrightly made with this Court.

REASONING: A local self-governing body shall have the autonomous power of internal organization and the authority to formulate rules and regulations in respect of self-governing affairs and implement the same, which has been made clear by this Court per J.Y. Interpretation No. 467. The autonomous power of internal organization refers to such authority of the legislative body and administrative agency of a local self-governing body

解釋理由書：地方自治團體享有自主組織權及對自治事項制定法規並執行之權限，業經本院釋字第四六七號解釋在案。所謂自主組織權係謂地方自治團體在憲法及法律規範之前提下，對該自治團體是否設置特定機關（或事業機構）或內部單位之相關職位、員額如何編成得視各該自治團體轄區、人口及其他情形，由該自治團體之立法機關及行政機關自行決定及執行之權限（參照地方制度法第二十八條第三款）。中華

to determine and implement such matters as whether a particular organ (or enterprise) or relevant positions or prescribed number of staff for an internal unit should be established based on the jurisdiction, population and other conditions of the self-governing body on the premise that such power and authority are subject to the Constitution and the laws (See Article 28 (iii) of the Local Government Systems Act). As of January 25, 1999, when the Local Government Systems Act was promulgated and implemented, the procedure for the establishment of the organs and positions of a local self-governing body shall be prescribed by the local legislative body by means of drawing up self-governing statutes respecting such organs and positions based on the guidelines formulated by the central competent authority, which is unambiguously set forth in Articles 28, 54 and 62 of the Local Government Systems Act. In respect of any and all organs and staff established or employed in violation of the aforesaid procedure, the local legislative body may, as a matter of course, delete all relevant budgets, and the auditing authority may

民國八十八年一月二十五日地方制度法公布實施後，各級地方自治團體之機關及職位之設置程序，應由地方立法機關依照法律及中央主管機關擬訂之組織準則，制定組織自治條例，始得辦理，此觀該法第二十八條、第五十四條及第六十二條之規定甚明。違反此一程序設立之機關及所置人員，地方立法機關自得刪除其相關預算、審計機關得依法剔除、追繳其支出。職位之設置法律已有明確規定，地方立法機關對於是否設置或員額多寡並無裁量之餘地，而訂定相關規章尚須相當時日者，經中央主管機關同意由各該地方行政機關先行設置並依法任命人員，係因應業務實際需要之措施，於過渡期間內，尚非法所不許。至法律規定得設置之職位，地方自治團體既有自主決定設置與否之權限，自應有組織自治條例之依據方可進用，乃屬當然。

eliminate and pursue the repayment of all expenditures, in relation to such organs and staff. However, where the establishment of a position has been clearly prescribed by law and thus leaves no discretion with the local legislative body to decide against the establishment of the position or to decide on the number of the staff, it is not against the law for the respective local administrative agencies to establish and appoint relevant personnel with the consent of the central competent authority for the practical purpose of handling their business on an interim basis, if it will take a considerable amount of time to formulate relevant rules and regulations. As for such positions as may be established by law, a self-governing body shall, as a matter of course, appoint and employ relevant personnel under applicable organic self-governing statutes since the self-governing body has the discretionary power to determine whether or not such positions will be established.

Article 43-I through -III of the Local Government Systems Act provides that any and all resolutions passed by local

地方制度法第四十三條第一項至第三項規定各級地方立法機關議決之自治事項，或依同法第三十條第一項至第

legislative bodies at various levels regarding self-governing affairs, as well as any and all self-governing laws and regulations described in Article 30-I through -IV of the said Act, that are in conflict with the Constitution, laws, central rules and regulations, or self-governing laws and regulations promulgated by a superior self-governing body, shall be null and void. Where a resolution, law or regulation ought to be declared null and void as mentioned above, under Article 43-III of the said Act, the Executive Yuan shall issue a written notice to that effect in the case of a resolution passed by the city council of a municipality under the direct jurisdiction of the said Yuan; the respective central competent authority shall issue the same in the case of a resolution passed by the council of a county or city; and the county government shall issue the same in the event of a resolution reached by the assembly of a township (town or city). Article 43-V thereof provides, "When doubt arises as to whether or not there is a conflict between resolutions as to the self-governing affairs referred to in Paragraphs I through III and the Constitu-

三項決議之地方法規，與憲法、法律、中央法規或上級自治團體自治法規牴觸者無效。發生上述無效情形時，依第四十三條第四項規定，直轄市議會議決事項由行政院予以函告，縣（市）議會議決事項由中央各該主管機關予以函告，鄉（鎮、市）民代表會議決事項由縣政府予以函告。第四十三條第五項「第一項至第三項議決自治事項與憲法、法律、中央法規、縣規章有無牴觸發生疑義時，得聲請司法院解釋之」及第三十條第五項「自治法規與憲法、法律、基於法律授權之法規、上級自治團體自治條例或該自治團體自治條例有無牴觸發生疑義時，得聲請司法院解釋之」之規定，均係指對相關業務有監督自治團體權限之各級主管機關，對議決事項或自治法規是否牴觸憲法、法律或其他上位規範尚有疑義，而未依相關規定逕予函告無效，向本院大法官聲請解釋而言。地方自治團體對函告內容持不同意見時，如受函告無效者為自治條例，該地方立法機關經會議決議得視其性質聲請本院解釋憲法或統一解釋法令，其聲請程式適用司法院大法官審理案件法第八條第一項或第二項之規定；如受函告無效者為自治規則由該地方自治團體最高層級之行政機關（即直轄市政府、縣、

tion, the laws, central laws and regulations, or county ordinances, petitions for interpretations thereon may be filed with the Judicial Yuan." And, Article 30-V thereof reads, "When doubt arises as to whether or not there is a conflict between self-governing laws or regulations and the Constitution, the laws, rules and regulations authorized by law, or self-governing laws and regulations promulgated by a superior self-governing body, petitions for interpretations thereon may be filed with the Judicial Yuan." The said provisions are intended to refer to such circumstances where the competent authority at various levels in charge of the supervision of self-governing bodies concerning relevant affairs still has doubts as to whether a particular resolution or self-governing statute is in conflict with the Constitution, the laws or any other superior legal norm, and thus has filed a petition for interpretation with this Court instead of forthrightly declaring such resolution or self-governing statute as null and void pursuant to the applicable provisions. If a local self-governing body has different opinions as to the contents that are declared null

市政府、鄉、鎮、市公所)聲請本院解釋憲法或統一解釋法令，並無須經由上開審理案件法第九條之層轉程序。蓋聲請解釋之標的既係中央主管機關或上級政府函告無效，內容且涉及地方自治團體之自治權限，該中央主管機關或上級政府已成為爭議之一造，自無更由其層轉之理。如受函告之法規為委辦規則，依地方制度法第二十九條之規定，原須經上級委辦機關核定後始生效力，受函告無效之地方行政機關應即接受，尚不得聲請本院解釋。又地方行政機關對同級立法機關議決事項發生執行之爭議時，應依同法第三十八條、第三十九條等相關規定處理，亦不得逕向本院聲請解釋。又地方制度法既無與司法院大法官審理案件法第五條第一項第三款類似之規定，允許地方立法機關部分議員或代表行使職權適用憲法發生疑義或發生法律牴觸憲法之疑義，得聲請本院解釋，各級地方立法機關自不得通過決議案，一面又以決議案有牴觸憲法、法律、或其他上位規範而聲請解釋，致違禁反言之法律原則。

and void, the legislative body thereof may, based on the nature of the matter at issue, file a petition for interpretation with this Court for constitutional interpretation or uniform interpretation of laws or regulations by means of resolution in the case of a self-governing statute that is declared null and void, and thus Article 8-I or –II of the Constitutional Interpretation Procedure Act will apply to the form and procedure for such a petition. And, in the case of a self-governing rule, the supreme administrative organ thereof (namely, government of a municipality under direct jurisdiction of the Executive Yuan, a county or city, or office of a township, town or city) may file a petition with this Court for constitutional interpretation or uniform interpretation of laws or regulations without having to go through the administrative hierarchy as referred to in Article 9 of the said Act. As the subject matter of the interpretation concerns the self-governing authority of a local self-governing body that is declared null and void by the central competent authority or the superior government, the central competent authority or the superior govern-

ment concerned has thus become a party to the dispute. Therefore, it would not be logical for the central competent authority or the superior government concerned to submit the petition for and on behalf of the self-governing body. If the self-governing rule or ordinance declared null and void is a delegation rule, it will not have become effective unless and until approved by the superior delegating agency whose decision must be accepted by the local administrative agency pursuant to Article 29 of the Local Government Systems Act, and thus no petition for interpretation may be made with this Court. Furthermore, where there is any dispute between the local administrative agency and the legislative body at the same level in respect of the enforcement of a resolution passed by the said legislative body, it shall be resolved in accordance with the applicable provisions of Articles 38 and 39 of the said Act, but not through petitions with this Court for interpretations. In addition, since there is no provision contained in the Local Government Systems Act similar to that of Article 5-I (iii) of the Constitutional Interpretation Procedure

Act, which may allow a specific number of councilors or representatives of a local legislative body to file a petition for interpretation with this Court if and when they have doubts as to the meanings of a constitutional provision governing their functions and authorities or questions on the constitutionality of a statute at issue, a local legislative body that passed a resolution may not file a petition for interpretation on the ground that it has doubts as to whether the originally passed resolution is in conflict with the Constitution, laws, or any other superior norm, thus resulting in violation of the legal doctrine of estoppel.

If the competent authority at various levels in charge of the supervision of local self-governing bodies, when it has doubts as to whether the administrative agency of a local self-governing body (namely, government of a municipality under direct jurisdiction of the Executive Yuan, a county or city, or office of a township, town or city), in handling a particular self-governing affair under Paragraphs II, IV and VI of Article 75 of the Local Government Systems Act, has violated the

有監督地方自治團體權限之各級主管機關，依地方制度法第七十五條對地方自治團體之行政機關（即直轄市、縣、市政府或鄉、鎮、市公所）辦理該條第二項、第四項及第六項之自治事項，認是否違背憲法、法律或其他上位規範尚有疑義，未依各該項規定予以撤銷、變更、廢止或停止其執行者，得依同條第八項規定聲請本院解釋。其未經本院解釋而逕予撤銷、變更、廢止或停止執行之行為，受處分之地方自治團體仍持不同見解，可否聲請本院解釋，同

Constitution, the laws or any other superior legal norm, does not revoke, amend, repeal or suspend the implementation of same pursuant to the respective provisions of said paragraphs, it may file a petition for interpretation with this Court according to Paragraph VIII of said Article. The said Paragraph VIII, however, does not specify whether a local self-governing body may initiate a petition with this Court for interpretation if it disagrees with any revocation, amendment, repeal or suspension of implementation made by the aforesaid competent authority, which did not file a petition with this Court prior to making the aforesaid disposition. It should be noted that the system of constitutional interpretation as contemplated by the Constitution is designed to impart authority to the constitution-interpreting organ to review various norms (See Article 78 of the Constitution). Though the Justices shall form a Constitutional Court to adjudicate matters relating to the dissolution of a political party violating the Constitution (See Article 5 of the Amendments to the Constitution), their authority does not extend to the review of the con-

條第八項文義有欠明確。衡諸憲法設立釋憲制度之本旨，係授予釋憲機關從事規範審查權限（參照憲法第七十八條），除由大法官組成之憲法法庭審理政黨違憲解散事項外（參照憲法增修條文第五條），尚不及於具體處分行為違憲或違法之審查。從而地方自治團體依第七十五條第八項逕向本院聲請解釋，應限於上級主管機關之處分行為已涉及辦理自治事項所依據之自治法規因違反上位規範而生之效力問題，且該自治法規未經上級主管機關函告無效，無從依同法第三十條第五項聲請解釋之情形。至於因上級主管機關之處分行為有損害地方自治團體之權利或法律上利益情事，其行政機關得代表地方自治團體依法提起行政訴訟，於窮盡訴訟之審級救濟後，若仍發生法律或其他上位規範違憲疑義，而合於司法院大法官審理案件法第五條第一項第二款之要件，亦非不得聲請本院解釋。至若無關地方自治團體決議事項或自治法規效力問題，亦不屬前開得提起行政訴訟之事項，而純為中央與地方自治團體間或上下級地方自治團體間之權限爭議，則應循地方制度法第七十七條解決之，尚不得逕向本院聲請解釋。

stitutionality or legality of a specific disposition. Therefore, the administrative agency of a self-governing body may directly file a petition for interpretation with this Court in accordance with Article 75-VIII of the said Act only when the disposition made by the aforesaid competent authority concerns the validity of a self-governing law or regulation based on which self-governing affairs are handled that may be in conflict with a superior legal norm, but a petition for interpretation may not be made pursuant to Article 30-V of the said Act because the self-governing law or regulation at issue is not declared by the competent authority as null and void. If a disposition made by a superior competent authority infringes upon the rights or legal interests of a local self-governing body, the administrative agency thereof may, on behalf of the local self-governing body, file an administrative litigation pursuant to law. If doubt remains as to whether a law or any other superior legal norm is unconstitutional after any and all remedies through litigation procedures at all levels are exhausted, a petition for interpretation may nonethe-

less be made with this Court if the requirements of Article 5-I (ii) of the Constitutional Interpretation Procedure Act are met. As for those issues neither concerning the validity of a resolution or self-governing statute of a local self-governing body, nor respecting matters for which an administrative litigation may be filed, but instead involving a dispute on the authority between the central government and a local self-governing body, or between local self-governing bodies at different levels, they shall be resolved in accordance with Article 77 of the Local Government Systems Act and thus no petition may be forthrightly made with this Court.

Where a local self-governing body that intends to file a petition for constitutional interpretation or uniform interpretation of laws in respect of matters not falling within the aforementioned categories while exercising its functions and authorities, the procedures for filing such a petition shall be differentiated as follows: (I) Upon the passage of a resolution by the local legislative body, it may make a petition with this Court for constitutional in-

地方自治團體行使職權，就非屬前述之事項聲請解釋憲法或統一解釋法律，其聲請程序應分別以觀：.地方立法機關經各該議會之決議，得依司法院大法官審理案件法第五條第一項第一款或第七條第一項第一款，分別聲請本院為憲法解釋或統一解釋，無須經由上級機關層轉，此亦為本院受理該類案件之向例（參照釋字第二六〇號、第二九三號、第三〇七號解釋）。直轄市、縣（市）之行政機關（即各該政府）辦理

terpretation or uniform interpretation in accordance with Article 5-I (i) or Article 7-I (i), respectively, of the Constitutional Interpretation Procedure Act without having to go through the administrative hierarchy (See J. Y. Interpretations Nos. 260, 293 and 307); (II) If the administrative agency of a municipality under direct jurisdiction of the Executive Yuan, or a county (or a city) (namely, the respective government thereof), in handling a particular self-governing affair, has any doubt or dispute as referred to in Article 5-I (i) of the Constitutional Interpretation Procedure Act, or any difference of opinions as referred to in Article 7-I (i) thereof, and, based on the nature of the matter at issue, such administrative agency is not bound by the opinions expressed by the central competent authority as to the Constitution or laws or regulations, the respective local government may forthright file a petition for interpretation with this Court without having to go through the administrative hierarchy in light of the constitutional intent to establish an institutional guarantee of local self-government; and (III) In implement-

自治事項，發生上開司法院大法官審理案件法第五條第一項第一款之疑義或爭議，或同法第七條第一項第一款見解歧異，且依其性質均無受中央主管機關所表示關於憲法或法令之見解拘束者，基於憲法對地方自治建立制度保障之意旨，各該地方政府亦得不經層轉逕向本院聲請解釋。薩直轄市、縣（市）之行政機關執行中央委辦事項，本應接受中央主管機關指揮監督，如有適用憲法發生疑義或適用法律發生見解歧異，其聲請本院解釋，仍應依司法院大法官審理案件法第九條之程序提出。又地方行政機關依職權執行中央法規，而未涉及各該地方自治團體之自治權限者亦同。均併此指明。

ing delegated affairs entrusted by the central government, the administrative agency of a municipality under direct jurisdiction of the Executive Yuan, or a county (or a city), shall be subject to direction and supervision by the central competent authority, and, where there is any doubt as to the application of a constitutional provision or difference of opinions on the application of a law, it shall still file a petition for interpretation with this Court pursuant to the procedure prescribed in Article 9 of the Constitutional Interpretation Procedure Act. Additionally, by the same token, the aforesaid procedure shall be applicable to the administrative agency of a local self-governing body enforcing a central law or regulation by its own power that does not concern the self-governing authority of the local self-governing body.

J. Y. Interpretation No.528（June 29, 2001）*

ISSUE: Is Article 3 of the Organized Crime Prevention Act, which imposes a term of 3 to 5 years of forced labor upon those who engage in organized crime, consistent with the protection of physical freedom guaranteed by Article 8 of the Constitution and not in violation of the principle of proportionality provided in Article 23 of the Constitution?

RELEVANT LAWS:

Articles 8 and 23 of the Constitution（憲法第八條、第二十三條）; J. Y. Interpretation No. 471（司法院釋字第四七一號解釋）Articles 2 and 3 of the Organized Crime Prevention Act（組織犯罪防制條例第二條、第三條）; Article 19, Paragraph 1, of the Act Governing the Control and Prohibition of Gun, Cannon, Ammunition, and Knife（槍砲彈藥刀械管制條例第十九條第一項）.

KEYWORDS:

forced labor（強制工作）, rehabilitative measure（保安處分）, organized crime（組織犯罪）, personal freedom（人民身體自由）, principle of proportionality（比例原則）.**

HOLDING: Based upon the educational and remedial goals embodied

解釋文：刑事法保安處分之強制工作，旨在對有犯罪習慣或以犯罪為

* Translated by Dr. Wen-Chen Chang.

** Contents within frame, not part of the original text, are added for reference purpose only.

in the criminal law, forced labor as one kind of rehabilitative measure is designed to reeducate criminals, who have been accustomed to committing crimes, trained professionally as criminals, or have become criminals because of long-term joblessness or homelessness, to cultivate their work ethic and learn skills so that they can live independently once they re-enter the society. Article 3, Paragraph 3, of the Organized Crime Prevention Act (hereinafter the "Act") prescribes that such persons, after serving their sentences or being pardoned, shall reenter the work environment for a probationary period of three years, under Paragraph 1, and for a probationary period of five years, under Paragraph 2. The Act is enacted to target criminal syndicates of more than three members, whose goals are to commit crimes, or whose members commit organized crimes with regularity, compulsion, and violence. Despite the role differentiations between group members in initiative, coordination, control, command, and participation, these criminal syndicates all use their organizations to commit crimes, establish internal hierarchical structures, and have

常業或因遊蕩或怠惰成習而犯罪者，令入勞動場所，以強制從事勞動方式，培養其勤勞習慣、正確工作觀念，習得一技之長，於其日後重返社會時，能自立更生，期以達成刑法教化、矯治之目的。組織犯罪防制條例第三條第三項：「犯第一項之罪者，應於刑之執行完畢或赦免後，令入勞動場所，強制工作，其期間為三年；犯前項之罪者，其期間為五年。」該條例係以三人以上，有內部管理結構，以犯罪為宗旨或其成員從事犯罪活動，具有集團性、常習性、脅迫性或暴力性之犯罪組織為規範對象。此類犯罪組織成員間雖有發起、主持、操縱、指揮、參與等之區分，然以組織型態從事犯罪，內部結構階層化，並有嚴密控制關係，其所造成之危害、對社會之衝擊及對民主制度之威脅，遠甚於一般之非組織性犯罪。是故組織犯罪防制條例第三條第三項乃設強制工作之規定，藉以補充刑罰之不足，協助其再社會化；此就一般預防之刑事政策目標言，並具有防制組織犯罪之功能，為維護社會秩序、保障人民權益所必要。至於針對個別受處分人之不同情狀，認無強制工作必要者，於同條第四項、第五項已有免其執行與免予繼續執行之規定，足供法院斟酌保障人權之基本原

solid controlling relationships among group members. As a result, organized crimes committed by these criminal syndicates have a much greater impact on our society and are a much more serious threat to our democratic system than other crimes. Thus, Article 3, Paragraph 3, of the Act prescribing forced labor is designed to address the inefficiency of criminal sentences and to help resocialize criminals and thus, should be considered as appropriate for the prevention of organized crimes and necessary for the maintenance of the social order and the protection of human rights. Furthermore, in case there is no necessity to require forced labor in given individual circumstances, Paragraphs 4 and 5 permit the suspension of execution or the continuance of forced labor and should be considered as sufficient for the courts, guided by the fundamental principle of protecting human rights, to make appropriate, necessary, and rational judgments and as a result, consistent with the protection of physical freedom guaranteed by Article 8 of the Constitution and not in violation of the principle of proportionality *(Verhältnis-*

則，為適當、必要與合理之裁量，與憲法第八條人民身體自由之保障及第二十三條比例原則之意旨不相牴觸。

mäßigkeitsprinzip) provided in Article 23 of the Constitution.

REASONING: Based upon the principle of special protection and with a special focus on the dangerous nature of criminals who may put the society at risk, the dual system of criminal sentences and rehabilitative measures in the criminal law provides various kinds of rehabilitative measures for criminals in addition to punitive sentences in an attempt to correct deviant and/or anti-social behavior. Similarly, for educational and remedial purposes, forced labor as one kind of rehabilitative measure is designed to reeducate criminals who have been accustomed to committing crimes, trained professionally as criminals, or become criminals because of long-term joblessness or homelessness to cultivate their work ethic and learn skills so that they can live independently when they reenter the society.

解釋理由書：刑事法採刑罰與保安處分雙軌之立法體制，本於特別預防之目的，針對具社會危險性之行為人所具備之危險性格，除處以刑罰外，另施以各種保安處分，以期改善、矯治行為人之偏差性格；保安處分之強制工作，旨在對有犯罪習慣或以犯罪為常業或因遊蕩或怠惰成習而犯罪者，令入勞動場所，以強制從事勞動方式，培養其勤勞習慣、正確工作觀念，習得一技之長，於其日後重返社會時，能自立更生，期以達成刑法教化、矯治之目的。

To prevent organized crimes and to protect the social order and individual rights, the Act stipulates the effects of its violations: Article 3, Paragraph 1, states

為防制組織犯罪，以維護社會秩序，保障人民權益，組織犯罪防制條例對違反該條例之行為，於第三條第一項至第三項規定：「發起、主持、操縱或

that the persons who initiate, coordinate, control or command criminal organizations shall be sentenced to no less than three years and no more than ten years of forced labor and may be fined up to the amount of one hundred million New Taiwan dollars, and that the persons who participate in these organizations shall be sentenced to no less than six months and no more than five years of forced labor and may be fined up to ten million New Taiwan dollars. Article 3, Paragraph 2, prescribes that if the persons, who committed the crimes mentioned in Paragraph 1 and have served their sentences or been pardoned, commit those crimes again, those who initiate, coordinate, control or command organized crimes shall be sentenced to no less than five years of forced labor and may be fined up to the amount of two hundred million New Taiwan dollars, and those who participate in these crimes shall be sentenced to no less than one year and no more than seven years of forced labor and may be fined up to twenty million New Taiwan dollars. Article 3, Paragraph 3, states that the persons who commit the crimes prescribed in

指揮犯罪組織者，處三年以上十年以下有期徒刑，得併科新臺幣一億元以下罰金；參與者，處六月以上五年以下有期徒刑，得併科新臺幣一千萬元以下罰金。」「犯前項之罪，受刑之執行完畢或赦免後，再犯該項之罪，其發起、主持、操縱或指揮者，處五年以上有期徒刑，得併科新臺幣二億元以下罰金；參與者，處一年以上七年以下有期徒刑，得併科新臺幣二千萬元以下罰金。」「犯第一項之罪者，應於刑之執行完畢或赦免後，令入勞動場所，強制工作，其期間為三年；犯前項之罪者，其期間為五年。」即除處以刑罰外，並予以強制工作之處分。同條例之第二條規定，係以三人以上，有內部管理結構，以犯罪為宗旨或其成員從事犯罪活動，具有集團性、常習性、脅迫性或暴力性之犯罪組織為規範對象，此與本院釋字第四七一號解釋認槍砲彈藥刀械管制條例第十九條第一項規定，不問行為人所具之犯罪習性、有無預防矯治其社會危險性之必要，均一律宣付強制工作，有違憲法保障人身自由意旨之情形有別，非可相提並論。犯罪組織成員間雖有發起、主持、操縱、指揮、參與等之區分，然犯罪組織為遂行其犯罪宗旨，乃以分工及企業化之方式從事犯罪行為，內部結

Paragraph 1, after serving their sentences or being pardoned, shall reenter the work environment for a probationary period of three years, and that for those who violate Paragraph 2, the period of forced labor shall last for five years. Accordingly, Article 3 provides criminals with forced-labor orders in addition to criminal sentences. Article 2 of the same Act targets criminal syndicates of more than three members, with internal hierarchical structures, whose goals are to commit crimes, or whose members commit organized crimes with regularity, compulsion, and violence. Thus, it differs from Article 19, Paragraph 1, of the Act Governing the Control and Prohibition of Gun, Cannon, Ammunition, and Knife, which prescribed forced labor for all criminals regardless of the nature of their crimes and the necessity of requiring rehabilitative measures to prevent potential social threats, and therefore, was declared, in J.Y. Interpretation No. 471, unconstitutional and inconsistent with the protection of physical freedom guaranteed by the Constitution. Despite the role differentiations between group members in initiative, coordination, con-

構階層化，並有嚴密之控制關係，犯罪組織之成員既屬常習性並具隱密性，犯罪型態多樣化，除一般犯罪外，甚或包括非法軍火交易、暴力控制選舉等，其對社會所造成之危害與衝擊及對民主制度之威脅，遠甚於一般之非組織性犯罪。組織犯罪防制條例第三條第三項乃設強制工作之規定，補充刑罰之不足，協助其再社會化；此就一般預防之刑事政策目標言，並具有消泯犯罪組織及有效遏阻組織犯罪發展之功能，為維護社會秩序、保障人民權益所必要。至於針對個別受處分人之不同情狀，認無強制工作必要者，於同條第四項「前項強制工作，於刑之執行完畢或赦免後，檢察官認為無執行之必要者，得檢具事證報請法院免予執行。」第五項「第三項強制工作執行已滿一年六個月，而執行機關認為無繼續執行之必要者，得檢具事證，報請檢察官聲請法院免予繼續執行。」已有免其執行與免予繼續執行之規定，檢察官自得衡量參與組織成員之各種情狀為聲請，由法院斟酌保障人權之基本原則，為適當、必要與合理之裁處，是組織犯罪防制條例第三條第三項「犯第一項之罪者，應於刑之執行完畢或赦免後，令入勞動場所，強制工作，其期間為三年；犯前項之罪者，其期間

trol, command, and participation, these criminal organizations structure their organizations as private enterprises with divisions of labor to commit crimes and serve their unlawful purposes. They establish internal hierarchical structures and have solid controlling relationships among group members. Membership in these criminal organizations is regular and secret. The types of crimes these organizations commit vary, including even the unlawful trading of guns and weapons and manipulating democratic elections by threatening or intimidating voters besides other offenses; thus, they have a much greater impact on our society and pose a much more serious threat to our democratic system than other crimes. Article 3, Paragraph 3, of the Act prescribing forced labor is designated to address the inefficiency of criminal sentences and to help resocialize criminals and thus, under the goals of policy regarding general prevention of crime, should be considered as effective in diminishing the number of criminal organizations and deterring the development of organized crime and necessary for the maintenance of the social

為五年。」之規定，與憲法第八條人民身體自由之保障及第二十三條比例原則之意旨不相牴觸。

order and the protection of human rights. Furthermore, in case there is no necessity to require forced labor given individual circumstances, Article 3, Paragraph 4, states that prosecutors may file applications with facts and evidence to the courts for the suspension of forced labor after the criminals have served their sentences or been pardoned. Paragraph 5 prescribes that if the period of forced labor has lasted for more than one year and six months and the executing agency considers continuation unnecessary, the executing agency may file applications with facts and evidence to the prosecutors for their appeal to the courts for the termination of the sentence. As the provisions permit the suspension of execution or the continuance of forced labor, prosecutors may take into consideration various individual circumstances to file applications for suspensions and the courts, guided by the fundamental principle of protecting human rights, shall make appropriate, necessary, and rational judgments. As a result, Article 3, Paragraph 3, of the Act prescribing that the persons who commit the crimes mentioned in Paragraph 1, after

serving their sentences or being pardoned, shall reenter the workforce for a probationary period of three years, under Paragraph 1, and for a probationary period of five years, under Paragraph 2 does not violate the protection of physical freedom guaranteed by Article 8 or contravene the principle of proportionality *(Verhältnismäßigkeitsprinzip)* provided in Article 23 of the Constitution.

J. Y. Interpretation No.529（July 13, 2001）*

ISSUE: Shall all males born in the Kinmen-Matsu area in 1975 be drafted after the abrogation of the Enforcement Regulation Governing the Males Eligible for Military Service to be Considered as Trained Class B Militiamen in the Kinmen-Matsu Region?

RELEVANT LAWS:

Article 24 of the Act Governing the Enforcement of the Conscription Act（兵役法施行法第二十四條）.

KEYWORDS:

Kinmen-Matsu area（金馬地區）, military service（兵役）, Trained Class B Militiamen（已訓乙種國民兵）, principle of legitimate expectation *(Der Grundsatz des Vertrauenschutzes)*（信賴保護原則）, draft（徵兵）.**

HOLDING: When the Enforcement Regulation Governing the Males Eligible for Military Service to be Considered as Trained Class B Militiamen in the Kinmen-Matsu Region (hereinafter the "Enforcement Regulation") were abrogated on November 7, 1992, due to the

解釋文：金馬地區役齡男子檢定為已訓乙種國民兵實施辦法，於中華民國八十一年十一月七日因戰地政務終止而廢止時，該地區役齡男子如已符合該辦法第二條第一項第二款及同條第二項之要件者，既得檢定為已訓乙種國民兵，按諸信賴保護原則（本院釋字第五

* Translated by Professor Spenser Y. Hor.

** Contents within frame, not part of the original text, are added for reference purpose only.

abolishment of the war zone government administration, the males of military service age in said area fulfilling the requirements of Article 2, Paragraph 1, Subparagraph 2, and Article 2, Paragraph 2, of the above Enforcement Regulation were still qualified as Trained Class B National Militiamen. According to the principle of legitimate expectation (*Der Grundsatz des Vertrauenschutzes*) (See J. Y. Interpretation No. 525), the rights of males who have not applied for such qualification shall not be otherwise affected thereby whether or not such males were above the age of eighteen at the time said Enforcement Regulation were abrogated. In abrogating said Enforcement Regulation, the competent authority shall take reasonable remedial measures or set up those provisions for the transition period so as not to affect the substantive legal status of such males acquired through laws and regulations. The statement, appearing in the Letters (81) Yan-yi-tze No. 7512 of the Ministry of National Defense dated November 5, 1992, Tai (81) Nei-yi-tze No. 8183830 of the Ministry of the Interior and Tai 85 Nei-tze No. 28784 of

二五號解釋參照），對於尚未及申請檢定之人，自不因其是否年滿十八歲而影響其權益。主管機關廢止該辦法時，應採取合理之補救措施，或訂定過渡期間之條款，俾免影響其依法規所取得之實體法上地位。國防部八十一年十一月五日（八一）仰依字第七五一二號函、內政部台（八一）內役字第八一八三八三〇號函及行政院八十五年八月二十三日台八十五內字第二八七八四號函釋，不問是否符合檢定為已訓乙種國民兵要件，而概以六十四年次男子為金馬地區開始徵兵之對象部分，應不予適用。

the Executive Yuan dated August 23, 1996, that all Kin-Ma area males born in 1975 shall be drafted regardless of whether they qualify as trained class B militiamen, shall no longer be applicable.

REASONING: After administrative laws and regulations come into force, the relevant authorities that enact laws and regulations shall protect the interest of trust of the people governed by said laws and regulations when duly amending or abrogating such laws and regulations. If such laws and regulations are abrogated or so revised due to the public interest, reasonable remedial measures or regulations for the transition period shall be established to mitigate the damage that may be incurred by the people in their trust of said laws and regulations in order to conform with the constitutional protection of civil rights, as stipulated in J. Y. Interpretation No. 525. In the event of any adverse affect on substantive legal status procured through trust in mandatory laws and regulations before their abrogation or amendment, persons holding such legal status unduly affected shall also be

解釋理由書：行政法規公布施行後，制定或發布法規之機關依法定程序予以修改或廢止時，應兼顧規範對象信賴利益之保護。其因公益之必要廢止法規或修改內容，致人民客觀上具體表現其因信賴而生之實體法上利益受損害，應採取合理之補救措施，或訂定過渡期間之條款，俾減輕損害，方符憲法保障人民權利之意旨，業經本院釋字第五二五號解釋在案。人民因信賴於法規廢止或修改前依強制規定而取得之實體法上地位有受不利之影響時，自亦應同受保護。

protected.

The period of mobilization to suppress strife came to an end on May 1, 1991, and subsequently the war zone government administration of the Kin-Ma area ended on November 7, 1992. As a result, the Enforcement Regulation Governing the Males Eligible for Military Service to be Considered as Trained Class B Militiamen in the Kinmen-Matsu Region enacted pursuant to Article 24 of the Act Governing the Enforcement of the Conscription Act (before its amendment on December 6, 2000) were abrogated, and the drafting practices of said area accordingly reverted to the legal norm in conformity with the Conscription Act. Originally, Kin-Ma area males of military service age fulfilling the requirements of Article 2, Paragraph 1, Subparagraph 2, and Article 2, Paragraph 2, of the Enforcement Regulation before its abrogation had the right to apply for qualification as Trained Class B National Militiamen upon satisfaction of all other requirements. However, upon abrogation of the Enforcement Regulation by the competent

八十年五月一日動員戡亂時期終止，八十一年十一月七日金馬地區戰地政務亦隨之終止。依八十九年十二月六日修正前兵役法施行法第二十四條訂定之金馬地區役齡男子檢定為已訓乙種國民兵實施辦法亦因而廢止，回歸常態法制，該地區依兵役法開始徵兵。金馬地區役齡男子如已符合廢止前該辦法第二條第一項第二款及同條第二項之要件者，原得於其他要件具備時依法請求檢定為已訓乙種國民兵，惟上開辦法經主管機關予以廢止時，對於尚未及申請檢定之人，其法律地位因而喪失，故基於此項法律地位之信賴即應予以保護。主管機關廢止該辦法，並自八十二年元月一日開始徵兵，以六十四年次役男為開始徵集之對象，致影響該役齡男子依兵役法服兵役之役種、訓練期間、應召服勤務及須否受徵召作戰等法律地位，自應採取合理之補救措施，或訂定過渡期間之條款，俾免影響其依法規所取得之實體法上地位。國防部八十一年十一月五日（八一）仰依字第七五一二號函、內政部台（八一）內役字第八一八三八三〇號函：「主旨：金門、馬祖地區自八十二年元月一日開始實施徵兵。說

authority, those who had not yet applied for qualification forfeited their legal status therefor. The trust in such legal status shall be protected. The competent authority abrogated the Enforcement Regulation and began drafting all males born in 1975 on January 1, 1993, affecting the legal status of such males regarding their type of military service, training period, service obligations, and whether they would be drafted in case of war. As such, the competent authority shall take reasonable remedial measures or set forth regulations for the transition period to avoid affecting the substantive legal status of such males acquired through laws and regulations. The Letters (81) Yan-yi-tze No. 7512 of the Ministry of National Defense dated November 5, 1992, and Tai (81) Nei-yi-tze No. 8183830 of the Ministry of the Interior indicate that: "Main Text: Drafting in the Kinmen and Matsu areas starts January 1, 1993. Explanation: II. The subjects eligible for the draft in the Kinmen and Matsu areas will be males born in 1975 (and thereafter). Drafting procedures will be conducted in 1994, and service will commence in 1995." In the Executive

明：二、金門、馬祖地區實施徵兵，以六十四年次役男為開始徵集之對象，於八十三年辦理徵兵處理，八十四年徵集入營。」及行政院八十五年八月二十三日台八十五內字第二八七八四號函覆監察院，其中所附國防部會商內政部對監察院調查「金馬地區六十四、六十五年次役男陳情免予徵集服役案」有關調查意見之研處情形，第三項關於六十四年次役男得否檢定為乙種已訓國民兵一節，載明：「六十四年次役男，當時年僅十七歲，尚不符檢定為已訓乙種國民兵，在原檢定辦法廢止後，自應回歸兵役法相關規定，辦理徵兵事宜。似不生法規效力之溯及問題。」不問是否符合檢定為已訓乙種國民兵要件，而概以六十四年次男子為金馬地區開始徵兵之對象部分，基於信賴保護原則，應不予適用。至本件據以聲請之案件，是否符合金馬地區役齡男子檢定為已訓乙種國民兵實施辦法第二條第一項第二款及同條第二項規定，實際接受各該地區軍事訓練或民防基本訓練（自衛隊訓練）並服勤務之要件，有關機關仍應斟酌全部相關資料及調查證據之結果，予以判斷，並依本解釋意旨，而為適當之處理，併此指明。

Yuan's reply letter Tai 85 Nei-tze No. 28784 dated August 23, 1996, to the Control Yuan, wherein it includes the part concerning the handling by the Ministry of National Defense and Ministry of the Interior in response to the Control Yuan's investigative opinions in the matter of the "petition by males born in 1975 and 1976 in the Kin-Ma area for exemption from military service," the section in Paragraph 3 regarding whether males born in 1975 can be qualified as Trained Class B Militiamen states, "Males born in the year of 1975 were at the time only seventeen years old, and therefore could not have qualified as Trained Class B Militiamen. Such males shall naturally be drafted in conformance with the Conscription Act since the above Enforcement Regulation have been abrogated. There seems to be no problem with the retrospective effect of laws and regulations." In consideration of the protection of trust, the part stating that all Kin-Ma area males born in 1975 shall be drafted, regardless of whether they fulfill the requirements of Trained Class B Militiamen, shall no longer apply. As to whether the case upon which this

Interpretation is based fulfills the requirements of Article 2, Paragraph 1, Subparagraph 2, and Article 2, Paragraph 2, of the said Enforcement Regulation, which concern the requirements of undergoing military training or basic civil defense training (self-defense corps training) and providing services, the competent authority shall render a decision following due consideration of all pertinent information and investigative results, and administer the matter in accordance with this Interpretation.

J. Y. Interpretation No.530（October 5, 2001）*

ISSUE: May the Judicial Yuan as the highest judicial organ enact, without proper authorization of law, trial rules or supervisory regulations?

RELEVANT LAWS:

Articles 77, 80 and 81 of the Constitution（憲法第七十七條、第八十條、第八十一條）; J. Y. Interpretation No. 216（司法院釋字第二一六號解釋）; Code of Criminal Procedure（刑事訴訟法） Article 4 (presently Article 7) of the Organic Act of the Judicial Yuan（司法院組織法第四條）（現行法第七條）; Articles 63, 64, 111, 112 and 113 of the Court Organic Act（法院組織法第六十三條、第六十四條、第一百十一條、第一百十二條、第一百十三條）; Organic Act of the Administrative Courts（行政法院組織法）; Organic Act of the Commission on the Disciplinary Sanction of Functionaries（公務員懲戒委員會組織法）; Precautionary Matters on Handling Civil Procedures（辦理民事訴訟事件應行注意事項）; Precautionary Matters on Handling Compulsory Enforcement（辦理強制執行事件應行注意事項）; Outlines for Handling Civil Preventive Proceedings（民事保全程序事件處理要點）; Precautionary Matters on the Courts' Handling of Civil Mediations (now abrogated)（法院辦理民

* Translated by Dr. Wen-Chen Chang.

** Contents within frame, not part of the original text, are added for reference purpose only.

事調解暨簡易訴訟事件應行注意事項）（已廢止）; Outlines for Compensation Received by the Witness(es) and Expert Witness(es) for Their Services, Travel Expenses and Testimonies（法院辦理民事事件證人鑑定人日費旅費及鑑定費支給要點）; Precautionary Matters on the Courts' Application of the Act Governing Disputes Mediation of Cities, Towns and Suburban Communities（法院適用鄉鎮市調解條例應行注意事項）; Precautionary Matters on Courts' Handling Criminal Procedures（法院辦理刑事訴訟案件應行注意事項）; Outlines for the Courts' Handling of Defendants' Bail in Criminal Procedures（法院辦理刑事訴訟案件被告具保責付要點）; Outlines for the Courts' Handling of Expedited Cases in Criminal Procedure（法院辦理刑事訴訟簡易程序案件應行注意事項）; Outlines for Facilitating Deadlines of Case Handling for All Courts（各級法院辦案期限實施要點）; Precautionary Matters on the Courts' Expedited Handling of Serious Criminal Offenses（法院辦理重大刑事案件速審速結注意事項）; Outlines for Handling Compulsory Enforcement Regarding Properties Unregistered after Succession（未繼承登記不動產辦理強制執行聯繫要點）; Regulation Governing Matters of Family（家事事件處理辦法）; Regulation Governing the Courts' Handling of Attorneys' Requests for Case Files（各級法院律師閱卷規則）; Regulation Governing the Compulsory Enforcement of Lands and Houses in the Taiwan Area（台灣地區土地房屋強制執行聯繫辦法）; Article 3 of the Standard Act for the Laws and Rules （中央法

規標準法第三條）; Outlines for the Prosecutors' Offices Handling Compensation Received by Witness(es） and Expert Witness(es） for Their Services, Travel Expenses and Testimonies in Criminal Cases（各級法院檢察署處理刑事案件證人鑑定人日費旅費及鑑定費支給要點）.

KEYWORDS:

judicial independence（審判獨立）, constitutional order of freedom and democracy（自由民主憲政秩序）,separation of powers（權立分立）, judicial autonomy（司法自主性）, power of rule making（規則制定權）, supervisory power of judicial administration（司法行政監督權）, prosecutors are submissive to the Executive（檢察一體）, power to issue orders regarding prosecutorial matters（檢察事務指令權）, highest judicial administrative Organ（最高司法行政機關）, highest adjudicative Organ（最高司法審判機關）.**

HOLDING: Article 80 of the Constitution prescribes that judges shall be above partisanship and make judgments independently in accordance with laws and free from any interference, ensuring that judges shall be bound only by laws and free from any other forms of interference, that judges holding office shall not be affected by their judgments, and that judges making judgments shall

解釋文：憲法第八十條規定法官須超出黨派以外，依據法律獨立審判，不受任何干涉，明文揭示法官從事審判僅受法律之拘束，不受其他任何形式之干涉；法官之身分或職位不因審判之結果而受影響；法官唯本良知，依據法律獨立行使審判職權。審判獨立乃自由民主憲政秩序權力分立與制衡之重要原則，為實現審判獨立，司法機關應有其自主性；本於司法自主性，最高司法

base them on their conscience and in accordance with laws. Judicial independence is one of the fundamental principles regarding the separation of powers in the constitutional order of freedom and democracy. To realize the principle of judicial independence, the judiciary shall preserve judicial autonomy. Based on judicial autonomy, the highest judicial organ shall retain the power of rulemaking governing its practice and judicial matters. Furthermore, in order to guarantee the right of instituting legal proceedings in accordance with legal proceedings and the right to fair and efficient trials, the highest judicial organ shall have the supervisory power of judicial administration for the purpose of guaranteeing the beneficiary the right to judicial access. Both the preservation of judicial autonomy and the exercise of judicial supervisory powers shall aim at safeguarding judicial independence. As a result, while the highest judicial organ may prescribe rules governing judicial practice within the scope and for the purpose of judicial administration and supervision, it shall not violate the aforementioned principle of judicial independ-

機關就審理事項並有發布規則之權；又基於保障人民有依法定程序提起訴訟，受充分而有效公平審判之權利，以維護人民之司法受益權，最高司法機關自有司法行政監督之權限。司法自主性與司法行政監督權之行使，均應以維護審判獨立為目標，因是最高司法機關於達成上述司法行政監督之目的範圍內，雖得發布命令，但不得違反首揭審判獨立之原則。最高司法機關依司法自主性發布之上開規則，得就審理程序有關之細節性、技術性事項為規定；本於司法行政監督權而發布之命令，除司法行政事務外，提供相關法令、有權解釋之資料或司法實務上之見解，作為所屬司法機關人員執行職務之依據，亦屬法之所許。惟各該命令之內容不得牴觸法律，非有法律具體明確之授權亦不得對人民自由權利增加法律所無之限制；若有涉及審判上之法律見解者，法官於審判案件時，並不受其拘束，業經本院釋字第二一六號解釋在案。司法院本於司法行政監督權之行使所發布之各注意事項及實施要點等，亦不得有違審判獨立之原則。

ence. Based upon judicial autonomy, the highest judicial organ may prescribe and amend rules governing the details and technical matters of judicial procedures. Rules prescribed by the judicial administration within its supervisory powers may lawfully provide concerned laws and rules, interpretative materials within its jurisdiction, or legal opinions governing judicial practice, in addition to judicial administrative matters, for lower courts and judicial staffs in their legal enforcement and applications. However, judicial rules shall not be inconsistent with laws and these rules shall not add any further restrictions on the people's freedoms and substantive rights without the concrete and detailed delegation of law. Furthermore, Interpretation No. 216 rendered by this Yuan has made it expressly clear that when making judgments in concrete cases, judges shall not be bound by judicial rules that are involved with legal opinions. Nor shall enforcement outlines and precautionary matters prescribed by the Judicial Yuan within its supervisory power of judicial administration contradict the principle of judicial independ-

ence.

With regard to prosecutors' investigation of criminal cases, as the occupational nature of prosecutors is one of submission to the Executive Yuan, the Prosecutor General and chief prosecutors shall retain the power to issue orders regarding prosecutorial matters according to Articles 63 and 64 of the Court Organic Act. Thus, unlike judges who shall make judgments independently, prosecutors executing their duties in accordance with the Code of Criminal Procedure shall be under the authority and supervision of the Prosecutor General and chief prosecutors. As for the administrative supervision of prosecutors' offices in the courts of all levels, because Article 111, Subparagraph 1, of the Court Organic Act prescribes that the Minister of Justice shall have the supervisory power over prosecutors' offices in the courts of all levels, the Minister of Justice may lawfully issue orders concerning administrative and supervisory matters of prosecution in order to facilitate criminal policies and expedite the execution of prosecutorial matters.

檢察官偵查刑事案件之檢察事務，依檢察一體之原則，檢察總長及檢察長有法院組織法第六十三條及第六十四條所定檢察事務指令權，是檢察官依刑事訴訟法執行職務，係受檢察總長或其所屬檢察長之指揮監督，與法官之審判獨立尚屬有間。關於各級法院檢察署之行政監督，依法院組織法第一百十一條第一款規定，法務部部長監督各級法院及分院檢察署，從而法務部部長就檢察行政監督發布命令，以貫徹刑事政策及迅速有效執行檢察事務，亦非法所不許。

Article 77 of the Constitution prescribes that the Judicial Yuan shall be the highest judicial organ in charge of civil, criminal, administrative cases, and in cases concerning disciplinary measures against public officials. Yet, according to the current Organic Act of the Judicial Yuan, however, the Judicial Yuan shall have seventeen Justices in charge of constitutional interpretations and unified legal interpretations; Justices form a Constitutional Court to adjudicate cases concerning the dissolution of unconstitutional parties, and under the Judicial Yuan, the courts of all levels, the Administrative Court, and the Commission on the Disciplinary Sanction of Functionaries shall be established. As a consequence, the Judicial Yuan, other than Justices with the aforesaid adjudicative powers, has become merely the highest judicial administrative organ, resulting in the separation of the highest adjudicative organ from the highest judicial administration. In order to be consistent with the intent of the framers of the Constitution that considered the Judicial Yuan as the highest judicial adjudicative organ, the Organic Act of the Ju-

憲法第七十七條規定：「司法院為最高司法機關，掌理民事、刑事、行政訴訟之審判及公務員之懲戒。」惟依現行司法院組織法規定，司法院設置大法官十七人，審理解釋憲法及統一解釋法令案件，並組成憲法法庭，審理政黨違憲之解散事項；於司法院之下，設各級法院、行政法院及公務員懲戒委員會。是司法院除審理上開事項之大法官外，其本身僅具最高司法行政機關之地位，致使最高司法審判機關與最高司法行政機關分離。為期符合司法院為最高審判機關之制憲本旨，司法院組織法、法院組織法、行政法院組織法及公務員懲戒委員會組織法，應自本解釋公布之日起二年內檢討修正，以副憲政體制。

dicial Yuan, the Court Organic Act, the Organic Act of Commission on the Disciplinary Sanction of Functionaries must be reviewed and revised in accordance with the designated constitutional structure within two years after the date of this Interpretation.

REASONING: Article 80 of the Constitution prescribes that judges shall be above partisanship and shall make judgments independently in accordance with laws and free from any interference, establishing the principle of judicial independence. The principle of judicial independence implies judges' independence both in making judgments and in holding office. The former means that judges shall be bound only by laws and free from any other forms of interference; the latter entails that judges holding office shall not be affected by their judgments. Based upon this principle, Article 81 of the Constitution ensures that judges shall hold office for life, that no judges shall be removed from office unless found guilty of criminal offenses, subject to disciplinary measures, or declared to be under interdiction,

解釋理由書：憲法第八十條規定法官須超出黨派以外，依據法律獨立審判，不受任何干涉，明文揭示法官獨立審判原則，其內容可分職務獨立性及身分獨立性二者，前者指法官從事審判僅受法律之拘束，不受其他任何形式之干涉；後者謂法官之身分或職位不因審判之結果而受影響。憲法第八十一條規定法官為終身職，非受刑事或懲戒處分或禁治產之宣告，不得免職，非依法律不得停職、轉任或減俸，即係本此意旨。審判獨立在保障法官唯本良知，依據法律獨立行使審判職權，為自由民主憲政秩序權力分立與制衡之重要機制；為實現審判獨立，司法機關應有其自主性，其內容包括法官之獨立、司法行政權及規則制定權。其中規則制定權係指最高司法機關得由所屬審判成員就訴訟（或非訟）案件之審理程序有關技術性、細節性事項制訂規則，以期使訴訟

and that no judges, except in accordance with laws, shall be suspended, transferred, or have their compensation diminished during their continuance in office. Judicial independence, one of the most important mechanisms regarding the separation of powers and checks and balances in the constitutional order of freedom and democracy, establishes that judges shall base their judgments on their conscience, hold trials and make judgments in accordance with laws. To realize the principle of judicial independence, the judiciary shall preserve judicial autonomy, entailing the independence of judges, judicial administration, and judicial rulemaking. Among them, judicial rulemaking implies that the highest judicial organ shall have its adjudicative members prescribe rules governing the details or technical matters involved in the procedures of litigation or non-contentious cases in order to ensure the litigation process as both fair and efficient and to guarantee the beneficiary the right to judicial access. Furthermore, the Constitution guarantees the right of instituting legal proceedings; thus, the State shall ensure that people have the right of

程序公正、迅速進行，達成保障人民司法受益權之目的。又人民之訴訟權為憲法所保障，國家應確保人民有依法定程序提起訴訟，受充分而有效公平審判之權利，以維護人民之司法受益權，最高司法機關對於法官自有司法行政之監督權。惟司法自主權與司法行政監督權之行使，均應以維護審判獨立為目標，因是最高司法機關於達成上述司法行政監督之範圍內，雖得發布命令，但不得違反首揭審判獨立之原則。最高司法機關發布司法行政監督之命令，除司法行政事務外，提供相關法令、有權解釋之資料或司法實務上之見解，作為所屬司法機關人員執行職務之依據，亦屬法之所許。惟各該命令之內容不得牴觸法律，非有法律具體明確之授權亦不得對人民自由權利增加法律所無之限制；如有涉及審判上之法律見解者，法官於審判案件時，並不受其拘束，業經本院釋字第二一六號解釋在案。

instituting legal proceedings in accordance with legal proceedings and the right to fair and efficient trials. Consequently, the highest judicial organ shall have the supervisory power of judicial administration. Yet, both the preservation of judicial autonomy and the exercise of judicial supervisory powers shall aim at safeguarding judicial independence. As a result, while the highest judicial organ may prescribe rules governing judicial practice within the scope of judicial administration and supervision, it shall not violate the aforementioned principle of judicial independence. Rules concerning judicial administration and supervision prescribed by the highest judicial organ may lawfully provide concerned laws and rules, interpretative materials within its jurisdiction, or legal opinions governing judicial practice, in addition to judicial administrative matters, for lower courts and judicial staffs in their legal enforcement and applications. Judicial rules, however, shall not be inconsistent with laws and these rules shall not add any further restrictions on the people's freedoms and substantive rights without the concrete and detailed

delegation of law. Furthermore, Interpretation No. 216 rendered by this Yuan has made it expressly clear that when making judgments in concrete cases, judges shall not be bound by judicial rules that are involved with legal opinions.

To guarantee both sufficiently and efficiently the people's beneficiary right to judicial access, the judicial administrative organ may, without encroachment on the principle of judicial independence, exercise its supervisory power over judges concerning their duties. Judges shall have the responsibility to handle cases before them lawfully, fairly, and promptly. If judges violate their duties or are negligent in the execution of their duties, they shall be notified, cautioned, or even punished according to relevant laws. Such cases may be exemplified as judges apply laws or rules that have been abrogated, or when judges leave the courtroom without due cause during hearings held by a tribunal en banc, thus resulting in the suspension of trials, or when judges prolong trial procedures or the completion of judgments has been delayed considerably. It is not

司法行政機關為使人民之司法受益權獲得充分而有效之保障，對法官之職務於不違反審判獨立原則之範圍內，自得為必要之監督。法官於受理之案件，負有合法、公正、妥速及時處理之義務，其執行職務如有違反，或就職務之執行有所懈怠，應依法促其注意、警告或予以懲處。諸如：裁判適用已廢止之法令、於合議庭行言詞辯論時無正當理由逕行退庭致審理程序不能進行、拖延訴訟積案不結及裁判原本之製作有顯著之遲延等等。至承審法官就辦理案件遲未進行提出說明，亦屬必要之監督方式，與審判獨立原則無違。對法官之辦案績效、工作勤惰等，以一定之客觀標準予以考查，或就法官審判職務以外之司法行政事務，例如參加法院工作會報或其他事務性會議等行使監督權，均未涉審判核心之範圍，亦無妨害審判獨立問題。

only necessary but also consistent with the principle of judicial independence to exercise supervisory power when judges cannot provide reasonable explanations for the delays of the cases before them. It does not involve the core of trial nor is it in violation of judicial independence when the judicial administration prescribes objective standards to review and monitor judges' litigation management and job performances or to supervise judges' execution of judicial administrative matters besides handling cases, such as their participation in judicial conferences or other courts' routine meetings.

In accordance with current legal system, the Judicial Yuan, based upon its supervisory powers of judicial administration, has prescribed the Precautionary Matters on Handling Civil Procedures, the Precautionary Matters on Handling Compulsory Enforcement, the Outlines for Handling Civil Preventive Proceedings, the Precautionary Matters on the Courts' Handling of Civil Mediations and Small Claims Litigation (issued on August 20, 1990, and abrogated on April 8, 2000, due

依現行法制，司法院本於司法行政監督權之行使，發布「辦理民事訴訟事件應行注意事項」、「辦理強制執行事件應行注意事項」、「民事保全程序事件處理要點」、「法院辦理民事調解暨簡易訴訟事件應行注意事項」（中華民國七十九年八月二十日發布，八十九年四月八日因配合修正「辦理民事訴訟事件應行注意事項」而廢止）、「法院辦理民事事件證人鑑定人日費旅費及鑑定費支給要點」、「法院適用鄉鎮市調解條例應行注意事項」、「法院辦理刑

to the revision of the Precautionary Matters on Handling Civil Procedures), the Outlines for Compensation Received by the Witness(es) and Expert Witness(es) for Their Services, Travel Expenses and Testimonies, the Precautionary Matters on the Courts' Application of the Act Governing Disputes Mediation of Cities, Towns and Suburban Communities, the Precautionary Matters on Courts' Handling Criminal Procedures, the Outlines for the Courts' Handling of Defendants' Bail in Criminal Procedures, the Outlines for the Courts' Handling of Expedited Cases in Criminal Procedure, the Outlines for Facilitating Deadlines of Case Handling for All Courts, the Precautionary Matters on the Courts' Expedited Handling of Serious Criminal Offenses, and the Outlines for Handling Compulsory Enforcement Regarding Properties Unregistered after Succession. These rules regarding civil and criminal, litigation and non-contentious matters of the courts and their branches have been prescribed to caution judges to execute duties lawfully, appropriately, and efficiently and to prevent biased decisions due to flawed delib-

事訴訟案件應行注意事項」、「法院辦理刑事訴訟案件被告具保責付要點」、「法院辦理刑事訴訟簡易程序案件應行注意事項」、「各級法院辦案期限實施要點」、「法院辦理重大刑事案件速審速結注意事項」、「未繼承登記不動產辦理強制執行聯繫要點」，為各級法院及分院受理民、刑訴訟事件、非訟事件，就有關職務上之事項，發布命令，若僅係促其注意，俾業務之執行臻於適法、妥當及具有效率，避免法官因個人之認知有誤，發生偏頗之結果，於未違背法律之規定，對於人民權利未增加法律所無之限制範圍內，與憲法方無牴觸。各該命令究竟有無違背本解釋意旨，應隨時檢討修正，以維審判獨立之原則。至司法院發布「家事事件處理辦法」、「各級法院律師閱卷規則」、「台灣地區土地房屋強制執行聯繫辦法」，如涉及人民權利之限制者，則須有法律具體明確之授權依據，並應依中央法規標準法第三條規定之程序發布，乃屬當然。

erations. Thus, as long as they are not in violation of laws and do not add further restrictions to people's rights, these rules shall be consistent with the Constitution. In order for the principle of judicial independence to be sustained, whether or not these rules violate this Interpretation shall be determined in a timely manner and said rules shall be reviewed and revised accordingly. Concerning the Regulation Governing Matters of Family, the Regulation Governing the Courts' Handling of Attorneys' Requests for Case Files, and the Regulation Governing the Compulsory Enforcement of Lands and Houses in the Taiwan Area, if they involve the restriction of people's rights and freedoms, they shall certainly be based upon a concrete and detailed delegation of law and published in accordance with the procedures prescribed by Article 3 of the Standard Act for the Laws and Rules.

With regard to prosecutors' investigations of criminal cases, as the occupational nature of prosecutors is one of submission to the Executive, the Prosecutor General and chief prosecutors shall

檢察官偵查刑事案件之檢察事務，依檢察一體之原則，檢察總長及檢察長有法院組織法第六十三條所定指揮監督各該署及所屬檢察署檢察官之權限，同法第六十四條復規定檢察總長、

retain the power to direct and supervise prosecutors under their authority according to Article 63 of the Court Organic Act. Article 64 of the same Act prescribes further that the Prosecutor General and chief prosecutors may handle prosecutorial matters directly, or delegate them to prosecutors under their authority. When prosecutors carry out their duties in accordance with the Code of Criminal Procedure such as conducting investigations, indictments, and executions, because of their occupational nature being that of submission to the Executive, they shall be under the authority and supervision of the Prosecutor General and chief prosecutors, thus making prosecutors different from judges who shall make judgments independently. As for the administrative supervision of prosecutors' offices in the courts of all levels, Article 111, Subparagraph 1, of the Court Organic Act prescribes that the Minister of Justice shall have the supervisory power over prosecutors' offices in the courts of all levels. According to Subparagraph 2 of the same provision, the Prosecutor General of the Prosecutors' Office in the Supreme Court shall super-

檢察長得親自處理其所指揮監督之檢察官事務，並得將該事務移轉於所指揮監督之其他檢察官處理之。是檢察官依刑事訴訟法行使偵查權所關之職務，例如實施偵查、提起公訴、實行公訴、擔當自訴、執行判決等，本於檢察一體之原則，在上開規定範圍內，係受檢察總長或其所屬檢察長之指揮監督，與法官之審判獨立尚屬有間。關於各級法院檢察署之行政監督，依同法第一百十一條第一款規定，由法務部部長監督各級法院及分院檢察署。最高法院檢察署檢察總長依同條第二款規定，僅監督該檢察署，有關行政監督事項並有同法第一百十二條及第一百十三條規定之適用。至檢察行政之監督，法務部部長就行政監督事項發布注意命令，以貫徹刑事政策及迅速有效執行檢察事務，亦非法所不許。法務部發布「各級法院檢察署處理刑事案件證人鑑定人日費旅費及鑑定費支給要點」，係本於法務行政監督權之行使，於符合本解釋意旨範圍內，與憲法尚無牴觸。

vise only the prosecutor's office under his/her authority, and for the matters of administrative supervision, Articles 112 and 114 shall apply accordingly. Regarding the matters of prosecutorial administration, the Minister of Justice may lawfully prescribe precautionary rules in order that criminal policies and prosecutorial matters may be carried out promptly and efficiently. The Outlines for the Prosecutors' Offices Handling Compensation Received by Witness(es) and Expert Witness(es) for Their Services, Travel Expenses and Testimonies in Criminal Cases, laid down by the Ministry of Justice, are based upon the supervisory and administrative power of the Ministry of Justice and consequently, do not violate the Constitution within the reach of this Interpretation.

Article 77 of the Constitution prescribes that the Judicial Yuan shall be the highest judicial organ in charge of civil, criminal, administrative cases, and cases concerning disciplinary measures against public officials. Yet, according to the current Organic Act of the Judicial Yuan,

憲法第七十七條規定：「司法院為最高司法機關，掌理民事、刑事、行政訴訟之審判及公務員之懲戒。」惟依現行司法院組織法規定，司法院設大法官十七人，審理解釋憲法及統一解釋法令案件，並組成憲法法庭，審理政黨違憲之解散事項；至三十六年三月三十一

however, the Judicial Yuan shall have seventeen Justices in charge of constitutional interpretations and unified legal interpretations and the Justices shall form a Constitutional Court to adjudicate cases concerning the dissolution of unconstitutional parties. Thus, Article 4 of the Organic Act of the Judicial Yuan promulgated on March 31, 1947, prescribed that the Judicial Yuan should have a civil, a criminal and an administrative tribunal, and a commission on the disciplinary punishment of public functionaries. Before going into effect, this Act was revised on December 25, 1947, and adhered to the previous court system of the tutelage period, to have the Supreme Court, the Administrative Court, and the Commission on the Disciplinary Sanction of Functionaries established under the Judicial Yuan. When the Organic Act of the Judicial Yuan was revised on June 29, 1980, it still prescribed that the Judicial Yuan should establish the Supreme Court, the Administrative Court, and the Commission on the Disciplinary Sanction of Functionaries. As a consequence, the Judicial Yuan, other than Justices vested with the power

日公布司法院組織法第四條雖規定：「司法院分設民事庭、刑事庭、行政裁判庭及公務員懲戒委員會。」未及施行，旋於三十六年十二月二十五日修正，沿襲訓政時期之司法舊制，於司法院下設最高法院、行政法院及公務員懲戒委員會。迨六十九年六月二十九日修正司法院組織法仍規定司法院設各級法院、行政法院及公務員懲戒委員會。是司法院除大法官職掌司法解釋及政黨違憲解散之審理外，其本身僅具最高司法行政機關之地位，致使最高司法審判機關與最高司法行政機關分離。為期符合司法院為最高審判機關之制憲本旨，司法院組織法、法院組織法、行政法院組織法及公務員懲戒委員會組織法，應自本解釋公布之日起二年內檢討修正，以副憲政體制。

of judicial interpretations and the adjudication of cases concerning the dissolution of unconstitutional parties, has become merely the highest judicial administrative organ, resulting in the separation of the highest adjudicative organ from the highest judicial administration. In order to be consistent with the intent of the framers of the Constitution, the Organic Act of the Judicial Yuan, the Court Organic Act, the Organic Act of the Administrative Courts, and the Organic Act of the Commission on the Disciplinary Sanction of Functionaries must be reviewed and revised in accordance with the designated constitutional structure within two years from the date of this Interpretation.

Justice Sen-Yen Sun filed concurring opinion.

Justice Yueh-Chin Hwang filed dissenting opinion .

本號解釋孫大法官森焱提出協同意見書；黃大法官越欽提出不同意見書。

J. Y. Interpretation No.531（October 19, 2001）*

ISSUE: Does the Act Governing the Punishment for Violation of Road Traffic Regulations, which prohibits a person from ever reinstating his/her driver's license once it has been revoked because he/she fled the scene of an accident he/she caused establish such a necessary public policy that it fully conforms to the intent of Article 23 of the Constitution?

RELEVANT LAWS:

Articles 15 and 23 of the Constitution（憲法第十五條、第二十三條）; Articles 62, Paragraph 2, and 67, Paragraph 1 of the Act Governing the Punishment for Violation of Road Traffic Regulations（道路交通管理處罰條例第六十二條第二項、第六十七條第一項）.

KEYWORDS:

immediate assistance（立即救護）, necessary measures（必要措施）, flee from scene of the car accident（車禍逃逸）, suspend the driver's license（吊銷駕駛執照）, the hit-and-run accident（駕車肇事逃逸）, reinstate the driver's license（再行考領駕駛執照）, mitigate damages（減輕損害）.**

HOLDING: Article 62, Paragraph 2, of Act Governing the Punishment

解釋文：中華民國七十五年五月二十一日修正公布之道路交通管理處

* Translated by Li-Chih Lin, Esq., J.D.

** Contents within frame, not part of the original text, are added for reference purpose only.

for Violation of Road Traffic Regulations (amended and promulgated on May 21, 1986, and later amended again and incorporated into Article 62, Paragraph 1, of the same Act on January 22, 1997) states that any vehicle operator who causes an accident resulting in the injury or death of another person, shall provide immediate assistance to the victims of the accident or shall take other necessary measures, and report the accident to the police. The aforementioned provision also provides that the wrongdoer must not flee from the scene of the accident and will have his/her driver's license suspended if he/she violates the provision. The purpose of the provision is to ensure road safety, protect the rights and interests of others, and maintain the social order, and is therefore consistent with Article 23 of the Constitution (See J.Y. Interpretation No. 284). In addition, Article 67, Paragraph 1, of the Act Governing the Punishment for Violation of Road Traffic Regulations specifically states that any vehicle operator whose driver's license has been suspended for fleeing the scene of a hit-and-run accident he/she caused may not have

罰條例第六十二條第二項（本條項已於八十六年一月二十二日修正併入第六十二條第一項）規定，汽車駕駛人駕駛汽車肇事致人受傷或死亡，應即採取救護或其他必要措施，並向警察機關報告，不得逃逸，違者吊銷駕駛執照。其目的在增進行車安全，保護他人權益，以維護社會秩序，與憲法第二十三條並無牴觸（本院釋字第二八四號解釋參照）。又道路交通管理處罰條例第六十七條第一項明定，因駕車逃逸而受吊銷駕駛執照之處分者，不得再行考領駕駛執照（本條項業於九十年一月十七日修正公布為終身不得考領駕駛執照）。該規定係為維護車禍事故受害人生命安全、身體健康必要之公共政策，且在責令汽車駕駛人善盡行車安全之社會責任，屬維持社會秩序及增進公共利益所必要，與憲法第二十三條尚無違背。惟凡因而逃逸者，吊銷其駕駛執照後，對於吊銷駕駛執照之人已有回復適應社會能力或改善可能之具體事實者，是否應提供於一定條件或相當年限後，予肇事者重新考領駕駛執照之機會，有關機關應就相關規定一併儘速檢討，使其更符合憲法保障人民權益之意旨。

his/her driver's license reinstated. (This provision was later amended and promulgated to prohibit any vehicle operator whose driver's license has been suspended because of the hit-and-run car accident from ever having his/her driver's license reinstated). The aforementioned provision is a necessary public policy to safeguard the lives and health of victims of vehicular accidents. The provision also imposes the duty of care on vehicle operators and is essential to maintain the social order and improve the public interest. The provision is therefore consistent with Article 23 of the Constitution. However, as for the vehicle operator whose driver's license has been suspended because of the hit-and-run accident he/she caused, whether he/she shall be given another chance to have his/her driver's license reinstated with certain conditions or within a certain period of time if he/she is able to return to the society or has been rehabilitated, the competent authorities should review the relevant provisions and consider revising those provisions to make them conform to the legislative intent of the Constitution in protecting the

rights and interests of the people.

REASONING: A vehicle operator who causes an accident resulting in the injury or death of a person or persons shall provide immediate assistance to the victim(s) of the accident or take other necessary measures to mitigate damages. It is necessary to regulate vehicle operators strictly in this matter because if such an operator causes an accident and promptly flees from the scene without providing any immediate assistance to the victim(s), it will become difficult to impose liability on the wrongdoer, injured victims may die due to the delay of medical treatment, and victims' families may not be able to seek compensation from the wrongdoer. Article 62, Paragraph 2, of Act Governing the Punishment for Violation of Road Traffic Regulations (amended and promulgated on May 21, 1986, and amended again and incorporated into Article 62, Paragraph 1, of the same Act on January 22, 1997) states that any vehicle operator who causes an accident resulting in the injury or death of someone shall provide immediate assistance to the vic-

解釋理由書：道路交通事故發生後，有受傷或死亡之情形者，應即時救護或採取必要之措施，以防損害範圍之擴大。如駕駛人於肇事後，隨即駕車逃離現場，不僅使肇事責任認定困難，更可能使受傷之人喪失生命、求償無門，自有從嚴處理之必要。七十五年五月二十一日修正公布之道路交通管理處罰條例第六十二條第二項規定，汽車駕駛人駕駛汽車肇事致人受傷或死亡，應即採取救護或其他必要措施，並向警察機關報告，不得逃逸，違者吊銷駕駛執照（本條項已於八十六年一月二十二日修正併入第六十二條第一項）。旨在增進行車安全，保護他人權益，以維護社會秩序，與憲法第二十三條並無牴觸（本院釋字第二八四號解釋參照）。又道路交通管理處罰條例第六十七條第一項明定，因駕車逃逸而受吊銷駕駛執照之處分者，不得再行考領駕駛執照（本條項業於九十年一月十七日修正公布為終身不得考領駕駛執照）。該規定係為維護車禍事故受害人生命安全、身體健康必要之公共政策，且在責令汽車駕駛人善盡行車安全之社會責任，屬維持社會秩序及增進公共利益所必要，與憲法

tims of the accident or shall take other necessary measures, and report the accident to the police. The aforementioned provision also provides that the wrongdoer must not flee from the scene and will have his/her driver's license suspended if he/she violates the provision. The purpose of the provision is to improve road safety, protect the rights and interests of others, and maintain the social order, and is therefore consistent with Article 23 of the Constitution (See J.Y. Interpretation No. 284). In addition, Article 67, Paragraph 1, of the Act specifically states that any vehicle operator whose driver's license has been suspended because of the hit-and-run accident he/she caused may not have his/her driver's license reinstated. (This provision was later amended and promulgated to prohibit any vehicle operator whose driver's license has been suspended because of the hit-and-run car accident from ever having his/her driver's license reinstated). The aforementioned provision is a necessary public policy to safeguard the lives and health of victims of vehicular accidents. The provision also imposes the duty of care on vehicle operators and is

第二十三條尚無違背。惟凡因而逃逸者，吊銷其駕駛執照後，對於吊銷駕駛執照之人已有回復適應社會能力或改善可能之具體事實者，是否應提供於一定條件或相當年限後，予肇事者重新考領駕駛執照之機會，有關機關應就相關規定一併儘速檢討，使其更符合憲法保障人民權益之意旨。

essential to maintain the social order and improve the public interest. The provision is therefore consistent with Article 23 of the Constitution. However, as for the vehicle operator whose driver's license has been suspended because of the hit-and-run accident he/she caused, whether he/she shall be given another chance to have his/her driver's license reinstated with certain conditions or within a certain period of time if he/she is able to return to the society or has been rehabilitated, the competent authorities should review the relevant provisions and consider revising those provisions to make them conform to the legislative intent of the Constitution in protecting the rights and interests of the people.

J. Y. Interpretation No.532（November 2, 2001）*

ISSUE: Are the provisions of the requisites for alteration of designation of the land belonging to the non-urban land use zoning provided by the Taiwan Province Operational Outlines of Review on the Application for Altering the Non-urban Lands in Mountain Slope Conservation Zones, Scenic Zones, and Forest Zones belonging to Type D Building (Kiln) Lands for Non-industrial (Kiln) Use in conflict with the Constitution?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）; J. Y. Interpretation No. 444（司法院釋字第四四四號解釋）; Articles 11, 13 and 15, Paragraph 1 of the Zoning Act（區域計畫法第十一條、第十三條、第十五條第一項）; Articles 13 and 15 of the Enforcement Rules of the Zoning Act（區域計畫法施行細則第十三條、第十五條）; Articles 6, Paragraph 1, 10, Paragraph 1, 12 and 17 of the Regulation Governing the Utilization Control of Non-Urban Land（非都市土地使用管制規則第六條第一項、第十條第一項、第十二條、第十七條）; Items 1, 2 and 3 of the Taiwan Province Operational Outlines of Review on the Application for Altering the Non-urban Lands in Mountain Slope Conservation Zones, Scenic Zones, and Forest Zones belonging to Type D Building (Kiln)

* Translated by Jer -Shenq Shieh.

** Contents within frame, not part of the original text, are added for reference purpose only.

Lands for Non-industrial (Kiln) Use (promulgated on September 16, 1994; ceasing to apply from July 1, 1999)（臺灣省非都市土地山坡地保育區、風景區、森林區丁種建築（窯業）用地申請同意變更作非工（窯）業使用審查作業要點第一點、第二點、第三點（八十三年九月十六日發布,八十八年七月一日起停止適用））.

KEYWORDS:

principle of power reservation（法律保留原則）, non-urban land use control（非都市土地使用管制）, alteration of designation（變更編定）, regulations set and issued due to the authority of administrative agency（職權命令）, matters of details and techniques（細節性、技術性事項）.**

HOLDING: The Taiwan Province Operational Outlines of Review on the Application for Altering the Non-urban Lands in Mountain Slope Conservation Zones, Scenic Zones, and Forest Zones belonging to Type D Building (Kiln) Lands for Non-industrial (Kiln) Use (hereinafter the "Outlines") issued on September 16, 1994, were the regulations set by the Taiwan Provincial Government due to its authority. Items 2 and 3 of the Outlines provided that if the non-urban lands in mountain slope conservation

解釋文：中華民國八十三年九月十六日發布之臺灣省非都市土地山坡地保育區、風景區、森林區丁種建築（窯業）用地申請同意變更作非工（窯）業使用審查作業要點，係臺灣省政府本於職權訂定之命令，其中第二、三點規定，山坡地保育區、風景區、森林區丁種建築（窯業）用地若具備(一)、廠地位於水庫集水區或水源水質水量保護區範圍內經由政府主動輔導遷廠或(二)、供作公共（用）設施使用或機關用地使用等要件之一，並檢具證明已符合前述要件之書件者，得申請同意

zones, scenic zones, and forest zones belonging to Type D building (kiln) lands accorded with one of the following requirements: (1) the factory land is located within the vicinity of water stored in a catchment area or a water quality and quantity protection area, and the Government actively assists in moving the factory; (2) lands are set aside for public facilities or for administrative agencies, and the documents conforming to the preceding requirements have been submitted, the landowner may apply for alteration of the Type D building (kiln) lands for non-industrial (kiln) use. These Outlines have gone beyond the range provided by the Act and have created other requisites for the alteration of designation on the land belonging to the non-urban land use zoning in the Zoning Act and the Regulation Governing the Utilization Control of Non-Urban Land. Said Outlines not only violate the intent of the Act to designate lands for their respective use in each zone, restrict the use and implement the control, but also add restrictions on the people's right to use their land. Therefore, said Outlines are in conflict with the principle

將丁種建築（窯業）用地變更作非工（窯）業使用。其內容已逾越母法之範圍，創設區域計畫法暨非都市土地使用管制規則關於非都市土地使用分區內使用地變更編定要件之規定，違反非都市土地分區編定、限制使用並予管制之立法目的，且增加人民依法使用其土地權利之限制，與憲法第二十三條法律保留原則有違，應不予適用。

of power reservation prescribed in Article 23 of the Constitution, and shall no longer be applied.

REASONING: Land is necessary for the people's social need. The State, based on the mutual reliance and mutual interest relationships of geography, population, resources, economic activities, etc., and according with the national economic development and environmental protection policy, shall make land use and conservation plans to accord with social need. The Zoning Act is a law enacted to reasonably coordinate the various needs of land use and balance the interests of all people (See J. Y. Interpretation No. 444). For carrying out the non-urban land use control and the public policy of environmental conservation, Paragraph 1 of Article 15 of this Act provides that after a regional plan has been announced and implemented, for the non-urban lands other than those prescribed in Article 11, the relevant municipal or county (city) governments shall draw the non-urban land use zoning map according to the non-urban land use zoning plan,

解釋理由書：按土地為人民生存所不可或缺，國家基於地理、人口、資源、經濟活動等相互依賴及共同利益關係，並配合國家經濟發展及環境保護之政策，應訂定符合社會需要之土地使用保育計畫，區域計畫法即係為合理調整土地上各種不同的使用需求與人民整體利益之均衡考量所制定之法律（參照本院釋字第四四四號解釋）。為貫徹非都市土地之使用管制與生態環境保育之公共政策，該法第十五條第一項規定，區域計畫公告實施後，不屬第十一條之非都市土地，應由有關直轄市或縣（市）政府，按照非都市土地分區使用計畫，製定非都市土地使用分區圖，並編定各種使用地，報經上級主管機關核備後，實施管制。變更之程序亦同。其管制規則由中央主管機關定之。內政部本此授權，並依據區域計畫法施行細則第十三條劃定各種使用區及第十五條編定各種使用地之規定，訂定非都市土地管制規則，按土地之使用種類與性質實施管制，以促進非都市土地之合理利用。

designate the lands for various uses, and implement the control after reporting to the upper-level authority concerned for review and recording. The procedure of alteration is the same. The control regulations shall be provided by the central authority concerned. Based on this delegation, and according to the provision of zoning in Article 13 and the provision of designating in Article 15 of the Enforcement Rules of the Zoning Act, the Ministry of the Interior therefore sets the Regulation Governing the Utilization Control of Non-Urban Land and implements the control in accordance with the designation and nature of land uses in order to advance the reasonable use of non-urban lands.

Item 1 of the Outlines (these Outlines were issued on September 16, 1994, by the Taiwan Provincial Government with the letter 83 F. J. Y. T. No. 161184; on August 4, 1999, this Provincial Government proclaimed that the Outlines would no longer apply from the date retroactive to July 1, 1999, with the letter 88 F. F. T. No. 157924.) provided that said Outlines

八十三年九月十六日發布之臺灣省非都市土地山坡地保育區、風景區、森林區丁種建築（窯業）用地申請同意變更作非工（窯）業使用審查作業要點（該要點係台灣省政府於八十三年九月十六日以八三府建一字第一六一一八四號函發布，已於八十八年八月四日經該省政府以八八府法字第一五七九二四號函示，溯自八十八年七月一日起停止適

were set according to the provisions of Articles 12 and 17 of the Regulation Governing the Utilization Control of Non-Urban Land, but they were actually the supplement to the implementation of the Zoning Act and the Regulation Governing the Utilization Control of Non-Urban Land by the Taiwan Provincial Government due to its authority as the authority concerned. Therefore, what the Outlines can provide shall be limited to those minor matters of details, techniques, etc., for implementing the Act. Items 2 and 3 of the Outlines provided that people who are going to apply for alteration of the non-urban lands in mountain slope conservation zones, scenic zones, or forest zones belonging to Type D building (kiln) lands for non-industrial (kiln) use shall comply with one of the following requirements: (1) the factory land is located within the vicinity of water stored in a catchment area or a water quality and quantity protection area, and the Government actively assists in moving the factory; (2) lands are set aside for public facilities or for administrative agencies. Besides, the landowners shall submit documents that conform

用），其第一點雖規定：本要點依據非都市土地使用管制規則第十二條、第十七條規定訂定，惟究其實質係台灣省政府基於主管機關之權限，為執行區域計畫法及非都市土地使用管制規則等所為之補充規定，故其內容僅能就執行母法之細節性、技術性等次要事項加以規範，該審查作業要點第二、三點以：山坡地保育區、風景區、森林區丁種建築（窯業）用地，申請同意變更作非工（窯）業使用者，應符合下列各款之一：(一)、廠地位於水庫集水區或水源水質水量保護區範圍內經由政府主動輔導遷廠者。(二)、供作公共（用）設施使用或機關用地使用者。土地所有權人並應檢具符合以上要件之證明書件。按非都市土地應分區編定、限制使用並實施管制，為區域計畫法第十五條第一項所明定，故非都市土地使用管制規則規定：經編定為某種使用之土地，應依其容許使用之項目使用（第六條第一項）、使用分區內各種使用地應在原使用分區範圍內申請變更編定（第十條第一項）。從而除依區域計畫法第十三條第一項規定，區域計畫公告實施後，擬定計畫之機關應視實際發展情況，每五年通盤檢討一次，並作必要之變更，及依該條但書規定，發生或避免重大災

to the preceding requirements. Paragraph 1 of Article 15 of the Zoning Act provides that the non-urban lands shall be designated for their respective use in each zone, the way of use shall be restricted and the control shall be implemented. The Regulation Governing the Utilization Control of Non-Urban Land therefore provide that once a parcel of land has been designated for certain use, it shall be used according to the way allowed (Paragraph 1 of Article 6); application for alteration of designation in each designated parcel of land belonging to a certain zone shall be limited to the alteration within the original zone (Paragraph 1 of Article 10). Accordingly, Paragraph 1 of Article 13 of the Zoning Act provides that after the regional plan has been announced and implemented, the agency which made the plan shall comprehensively review the plan every five years and make necessary alterations, depending on the actual development. This Article also provides that if there is an occurrence of or need to avoid a serious disaster, institution of important development or construction undertakings, or suggestion from the Re-

害、興辦重大開發或建設事業、區域建設推行委員會之建議，得隨時檢討變更外，若擬將使用地變更為他種用途時，依非都市土地使用管制規則第十二條第一項規定，必須由申請人擬具興辦事業計畫，並經變更前、後目的事業主管機關之核准始得為之；同條第二項並規定：前項變更面積在十公頃以上者，變更後目的事業主管機關在核准興辦事業計畫前，其土地使用計畫應先徵得各該區域計畫原擬定機關之同意；第十七條第一款更規定：依目的事業主管機關核定計畫編定或變更編定之各種使用地，於該事業計畫註銷或撤銷者，其已依法變更使用部分，依其使用性質變更編定為適當使用地；其餘土地依變更編定前原編定使用地類別變更編定。前述審查作業要點創設區域計畫法暨非都市土地使用管制規則關於非都市土地使用分區內使用地變更編定之要件，不僅違反非都市土地分區編定、限制使用並予管制之立法目的，更增加人民依法使用其土地權利之限制，已非純屬執行母法有關細節性與技術性之補充規定，與憲法第二十三條法律保留原則有違，應不予適用。

gional Construction Advance Committee, the agency may review or alter the regional plan at any time. If there is a designated land plan to be altered for another use, according to Paragraph 1 of Article 12 of the Regulation Governing the Utilization Control of Non-Urban Land, the applicant shall prepare the implementation plan and this plan shall be approved by the authorities concerned with the implementation, including the authorities both before and after the alteration. Paragraph 2 of the same Article further provides that if the land referred to in the preceding paragraph is larger than ten hectares, before the authority concerned with the implementation after the alteration makes the decision to approve the plan implementation, the land use plan shall first be approved by the agency which originally made the regional plan. Subparagraph 1 of Article 17 moreover provides that if the designation or alteration of designation of the land was based on the plan which was approved by the authority concerned with the implementation, and the plan implementation has been cancelled or revoked, this portion of the land on which the des-

ignation has been altered according to the law shall be designated for other suitable use according to the nature of the use; the other portion shall be designated for the use designated before the alteration. The aforesaid Outlines have created other requisites for the alteration of designation on the land belonging to the non-urban land use zoning in the Zoning Act and the Regulation Governing the Utilization Control of Non-Urban Land. These Outlines not only violate the intent of the Act to designate lands for their respective use in each zone, restrict the use and implement the control, but also add restrictions on the people's right to use their land. This is more than just a supplement to the matters of details and techniques for implementing the Act, and this is in conflict with the principle of power reservation prescribed in Article 23 of the Constitution. Therefore, these Outlines shall no longer be applied.

Justice Jyun-Hsiung Su filed concurring opinion.

本號解釋蘇大法官俊雄提出協同意見書。

J. Y. Interpretation No.533（November 16, 2001）*

ISSUE: Shall disputes between the Bureau of National Health Insurance and contracted healthcare providers arising from performance of the contract be regarded as a matter of public law nature and thus be resolved through the administrative litigation procedure?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）; Articles 1, 2, 3, 5, Paragraphs 1 and 3, and 6, 31 , 55 of the National Health Insurance Act（全民健康保險法第一條、第二條、第三條、第五條第一項及第三項、第六條、第三十一條、第五十五條）; Articles 2, 3, 8, Paragraph 1 of the Administrative Proceedings Act（行政訴訟法第二條、第三條、第八條第一項）; Article 137, Paragraph 1, Subparagraphs 1 and 2, of the Administrative Procedure Act（行政程序法第一百三十七條第一項第一款及第二款）J.Y. Interpretation Nos. 466, 472,473 and 524（司法院釋字第四六六號、第四七二號、第四七三號、第五二四號解釋）.

KEYWORDS:

contracted healthcare providers（特約醫事服務機構）, national health insurance（全民健康保險）, Bureau of National Health Insurance（中央健康保險局）, administrative contract（行政契約）, right to sue（訴訟權）, administrative proceeding（行政訴訟）, proceeding for payment or performance（給付訴訟）.**

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* Translated by Wei-Feng Huang of THY Taiwan International Law Offices.

** Contents within frame, not part of the original text, are added for reference purpose only.

HOLDING: Article 16 of the Constitution stipulates that the people's right of instituting legal proceedings should be guaranteed. Its aim is to ensure that when the people's rights are infringed upon, they may seek remedy by instituting proceedings pursuant to procedures set by the law. To exercise its authorized powers with respect to matters relevant to the administration of national health insurance, the Bureau of National Health Insurance, being a government organization pursuant to its organic law, enters into a National Health Insurance Healthcare Providers Contract with various healthcare providers appointing such providers as the providers of medical and healthcare services for the insured so as to achieve the administrative purposes of improving people's health and maximizing public benefits. For these reasons, the said contract has the nature of an administrative contract. Where the contracting parties disagree as to the provisions of the contract, it is a dispute under public law. According to Article 2 of the Administrative Proceedings Act amended and promulgated on October 28, 1998, "A dispute under public law, unless otherwise

解釋文：憲法第十六條規定，人民之訴訟權應予保障，旨在確保人民於其權利受侵害時，得依法定程序提起訴訟以求救濟。中央健康保險局依其組織法規係國家機關，為執行其法定之職權，就辦理全民健康保險醫療服務有關事項，與各醫事服務機構締結全民健康保險特約醫事服務機構合約，約定由特約醫事服務機構提供被保險人醫療保健服務，以達促進國民健康、增進公共利益之行政目的，故此項合約具有行政契約之性質。締約雙方如對契約內容發生爭議，屬於公法上爭訟事件，依中華民國八十七年十月二十八日修正公布之行政訴訟法第二條：「公法上之爭議，除法律別有規定外，得依本法提起行政訴訟。」第八條第一項：「人民與中央或地方機關間，因公法上原因發生財產上之給付或請求作成行政處分以外之其他非財產上之給付，得提起給付訴訟。因公法上契約發生之給付，亦同。」規定，應循行政訴訟途徑尋求救濟。保險醫事服務機構與中央健康保險局締結前述合約，如因而發生履約爭議，經該醫事服務機構依全民健康保險法第五條第一項所定程序提請審議，對審議結果仍有不服，自得依法提起行政爭訟。

provided by law, may be instituted under this Act as an administrative litigation." Article 8, Paragraph 1, provides: "Where actions arise, under public law, between the people and the central or local authorities for payment of property or request for performance other than administrative acts, then proceedings for payment or performance may be commenced. The same applies to actions arising out of contracts governed by public law." Thus, when seeking relief, the procedures for administrative litigations shall be adhered to. Where a dispute arises regarding performance of the said contract between an insurance healthcare provider and the Bureau of National Health Insurance, and the healthcare provider has applied for a review in accordance with the procedures stipulated in Article 5, Paragraph 1, of the National Health Insurance Act but is not satisfied with the review, it may commence a proceeding for payment or performance pursuant to the laws.

REASONING: Article 16 of the Constitution stipulates that the people's right of instituting legal proceedings

解釋理由書：憲法第十六條規定，人民之訴訟權應予保障，旨在確保人民於其權利受侵害時，得依法定程序

should be guaranteed. Its aim is to ensure that when the people's rights are infringed upon, they may institute legal proceedings pursuant to procedures set by the law, and shall be entitled to fair trials and appropriate relief. Whether litigation of real cases should follow ordinary or administrative litigation procedures is an issue for the legislative body to decide, depending on the nature of cases litigated and the function of the existing litigation system. Adjudication of civil and administrative litigations in our State is to be carried out by courts of different nature according to the existing laws-- it being a dual system of litigation. Unless otherwise provided by law, all private law disputes shall be adjudicated by ordinary courts, while all public law disputes shall be adjudicated by administrative courts (See J.Y. Interpretation No. 466).

提起訴訟並受公平審判，以獲得適當之救濟。具體案件之訴訟，究應循普通訴訟程序抑或依行政訴訟程序為之，應由立法機關衡酌訴訟案件之性質及既有訴訟制度之功能等而為設計。我國關於民事訴訟與行政訴訟之審判，依現行法律之規定，分由不同性質之法院審理，係採二元訴訟制度。除法律別有規定外，關於因私法關係所生之爭執，由普通法院審判；因公法關係所生之爭議，則由行政法院審判之（本院釋字第四六六號解釋參照）。

Within their lawful authority, administrative bodies may engage private citizens, by entering into administrative contracts, for the performance of specific services in order to achieve administrative objectives and facilitate the execution of

行政機關基於法定職權，為達成行政目的，得以行政契約與人民約定由對造為特定用途之給付，俾有助於該行政機關執行其職務，而行政機關亦負相對之給付義務（行政程序法第一百三十七條第一項第一款及第二款參照）。國

duties of administrative bodies, and such bodies' shall bear the corresponding obligation of payment or performance (See Article 137, Paragraph 1, Subparagraphs 1 and 2, of the Administrative Procedure Act). For the purposes of administering national health insurance, providing health services and promoting the health of all citizens (See Article 1 of the National Health Insurance Act), Articles 3 and 6 of the National Health Insurance Act authorize the Department of Health of the Executive Yuan to set up the Bureau of National Health Insurance as the insurer to administer the National Health Insurance program. Further, Article 55 of the said Act permits the Bureau to enter into a National Health Insurance Healthcare Providers Contract with healthcare providers for the provision of clinical or hospital care services, by the healthcare providers pursuant to Article 31 of the said Act and the National Health Insurance Medical Benefit Regulations, in the event of illness, injury or maternity, to beneficiaries during the period of insurance. The services so provided are the basis for payment by the said Bureau (See

家為辦理全民健康保險，提供醫療保健服務，以增進國民健康（全民健康保險法第一條參照），依全民健康保險法第三條、第六條規定，由行政院衛生署設中央健康保險局為保險人，以辦理全民健康保險業務，並由中央健康保險局依全民健康保險法第五十五條規定，與保險醫事服務機構締結全民健康保險特約醫事服務機構合約，於保險對象在保險有效期間，發生疾病、傷害、生育事故時，由特約保險醫事服務機構依全民健康保險法第三十一條及全民健康保險醫療辦法，給予門診或住院診療服務，以為中央健康保險局之保險給付（全民健康保險法第二條）。按全民健康保險為強制性之社會保險，攸關全體國民福祉至鉅，具公法之性質，業經本院釋字第五二四號、第四七三號、第四七二號解釋闡釋甚明。中央健康保險局與保險醫事服務機構締結之全民健康保險特約醫事服務機構合約，該合約既係由一方特約醫事服務機構提供就醫之保險對象醫療服務，而他方中央健康保險局支付其核定之醫療費用為主要內容，且依全民健康保險特約醫事服務機構合約第一條之規定意旨，中央健康保險局之費用給付目的，乃在使特約醫事服務機構依照全民健康保險法暨施行細則、全民健康

Article 2 of the National Health Insurance Act). The compulsory insurance system adopted for the National Health Insurance program affects all the nationals' well-being to a great extent and falls within the public law arena. The foregoing has been explicitly explained in this Yuan's Interpretations Nos. 472, 473 and 524. By entering into the National Health Insurance Healthcare Providers Contract, the Bureau of National Health Insurance and the insurance healthcare providers covenant, on the part of the contracted healthcare providers, to provide medical services to the insured, and, on the part of the Bureau, to pay the approved service charges. Further, according to the provision in Article 1 of the said contract, the reason for payment by the Bureau is to promote national health and public benefits through the services provided by contracted healthcare providers, and they must comply with the laws of a public nature, i.e., the National Health Insurance Act and its Enforcement Rules, the Special Provisions and Management Rules for the National Health Insurance Healthcare Providers, and the National Health Insurance Medical Bene-

保險醫事服務機構特約及管理辦法、全民健康保險醫療辦法等公法性質之法規提供醫療服務，以達成促進國民健康、增進公共利益之行政目的。又為擔保特約醫事服務機構確實履行其提供醫療服務之義務，以及協助中央健康保險局辦理各項保險行政業務，除於合約中訂定中央健康保險局得為履約必要之指導外，並為貫徹行政目的，全民健康保險法復規定中央健康保險局得對特約醫事服務機構處以罰鍰之權限，使合約當事人一方之中央健康保險局享有優勢之地位，故此項合約具有行政契約之性質。締約雙方如對契約內容發生爭議，自屬公法上爭訟事件。依八十七年十月二十八日修正公布之行政訴訟法第二條：「公法上之爭議，除法律別有規定外，得依本法提起行政訴訟。」第三條：「前條所稱之行政訴訟，指撤銷訴訟、確認訴訟及給付訴訟。」第八條第一項：「人民與中央或地方機關間，因公法上原因發生財產上之給付或請求作成行政處分以外之其他非財產上之給付，得提起給付訴訟。因公法上契約發生之給付，亦同。」等規定，訴訟制度已臻完備，本件聲請人特約醫事服務機構，如對其與中央健康保險局所締結之合約內容發生爭議，既屬公法上事件，經該

fit Regulations, in their provision of healthcare services. To ensure fulfillment of contract obligations to perform medical services by contracted healthcare providers and their assistance in the said Bureau's administration of health insurance matters, the said contract allows the Bureau to set guidelines for the performance of the contract. In addition, as a means to achieve administrative objectives, the National Health Insurance Act provides the Bureau with authority to discipline contracted healthcare providers, placing one party to the contract, the Bureau, in a privileged position. Thus, this contract has the attributes of an administrative contract, and any dispute between the contracting parties regarding the contents of the contract shall be governed by public law. According to the Article 2 of the Administrative Proceedings Act amended and promulgated on October 28, 1998, "A dispute under public law, unless otherwise provided by law, must be instituted under this law as an administrative litigation"; Article 3: "Administrative litigations referred to in the preceding Article are proceedings for revocation, confirmation and

特約醫事服務機構依全民健康保險法第五條第一項所定程序提請審議，對審議結果仍有不服時，自得依法提起行政爭訟。

payment or performance"; and Article 8, Paragraph 1: "Where actions arise, under public law, between the people and the central or local authorities for payment of property or request for performance other than administrative acts, then proceedings for payment or performance may be commenced. The same applies to actions arising out of contracts governed by public law," the system for instituting proceedings is complete. Where the applicant of this Interpretation, the contracted healthcare provider, disagrees with the Bureau of National Health Insurance over the contents of the said contract, it is a matter of public law and the applicant shall apply for a review in accordance with the procedures set forth in Article 5, Paragraph 1, of the National Health Insurance Act. It is only when the applicant is unsatisfied with the result of the review that an administrative litigation can commence pursuant to the law.

The National Health Insurance Act was enacted on August 9, 1994. Its Article 5, Paragraph 1, provides: "There shall be a Disputes Settlement Board established

全民健康保險法制定於八十三年八月九日，其第五條第一項規定：「為審議本保險被保險人、投保單位及保險醫事服務機構對於保險人定之案件發生

under the National Health Insurance program to settle disputes arising from cases approved by the Insurer, and raised by the insured, the group insurance applicants or the contracted healthcare providers." Paragraph 3 states: "The insured and the group insurance applicants may file administrative appeals and administrative litigations if they disagree with the Board's decision over the disputes in question." The remedy procedures to be followed in the event of the insurance healthcare providers' disagreement with the Dispute Settlement Board's decision are not explicitly stated. There is no disagreement that the Bureau of National Health Insurance and the contracted healthcare providers have agreed, in the said contract, to submit to the jurisdiction of the Civil Court. However, since the enforcement of the new administrative litigation procedures, the parties shall now seek resolutions using the procedures for administrative litigations.

爭議事項，應設全民健康保險爭議審議委員會。」第三項規定：「被保險人及投保單位對爭議案件之審議不服時，得依法提起訴願及行政訴訟。」就保險醫事服務機構，於不服全民健康保險爭議審議委員會審議結果，應循何種訴訟途徑救濟未設規定，中央健康保險局於前開全民健康保險特約醫事服務機構合約中與特約醫事服務機構合意定民事訴訟管轄法院（本院釋字第四六六號解釋參照），固非可議，惟行政訴訟新制實施之後，自應循行政爭訟程序解決。

Justice Geng Wu filed concurring opinion.

本號解釋吳大法官庚提出協同意見書。

J. Y. Interpretation No.534（November 30, 2001）*

ISSUE: Is the law, which provides that in the case where private land has been expropriated but not utilized within one year after payment of expropriation compensation, the original owner may exercise the right of redemption within a five-year period provided that utilization of the land is not prevented by the original owner and other land users unrelated to the owner, in conflict with the constitutional protection of the people's property right?

RELEVANT LAWS:

Articles 23 and 143, Paragraph 1, of the Constitution（憲法第二十三條、第一百四十三條第一項）; Articles 215, Paragraph 3, 219, Paragraph 1, Subparagraph 1, and 222, 224, 238 of the Land Act（土地法第二百十五條第三項、第二百十九條第一項第一款、第二百二十二條、第二百二十四條、第二百三十八條）.

KEYWORDS:

expropriation（徵收）, private land owner（私有土地所有權人）, right to redeem（贖回不動產之權利）, public utility（公用事業）, principle of necessity（必要性原則）.**

HOLDING: The protection and restriction of the people's right to legally

解釋文：人民依法取得之土地所有權，應受法律之保障與限制，為憲

* Translated by Wei-Feng Huang of THY International Law Offices.

** Contents within frame, not part of the original text, are added for reference purpose only.

acquired land ownership are provided for in Article 143, Paragraph 1, of the Constitution. Expropriations of land are compulsory acquisitions by the government, through lawful procedures, for public utility purposes. The criteria and procedures for expropriation must conform to the principle of necessity stipulated in Article 23 of the Constitution. Article 219, Paragraph 1, Subparagraph 1, of the Land Act provides that where private lands are expropriated but not yet utilized according to the plans, within one year after payment of expropriation compensation, the original land owners may redeem their lands at the expropriation price by applying to the relevant municipal or county land authorities (or the land authorities of municipalities governed by the central government and land authorities of other municipalities and counties, as amended on January 26, 2000) within the statutory period of five years commencing from the day following the said one-year period. The purpose for reserving the right to redeem expropriated lands to land owners is to prevent unnecessary expropriations or delays in constructing public utility.

法第一百四十三條第一項所明定。土地徵收係國家因公共事業之需要，對人民受憲法保障之財產權，經由法定程序予以強制取得之謂，相關法律所規定之徵收要件及程序，應符合憲法第二十三條所定必要性之原則。土地法第二百十九條第一項第一款規定，私有土地經徵收後，自徵收補償發給完竣屆滿一年，未依徵收計畫開始使用者，原土地所有權人得於徵收補償發給完竣屆滿一年之次日起五年內，向該管市、縣地政機關（中華民國八十九年一月二十六日修正為「直轄市或縣（市）地政機關」，下同）聲請照徵收價額收回其土地，原係防止徵收機關為不必要之徵收，或遷延興辦公共事業，特為原土地所有權人保留收回權。是以需用土地機關未於上開期限內，依徵收計畫開始使用徵收之土地者，如係因可歸責於原土地所有權人或為其占有該土地之使用人之事由所致，即不得將遷延使用徵收土地之責任，歸由徵收有關機關負擔；其不能開始使用係因可歸責於其他土地使用人之事由所致，而與原土地所有權人無涉者，若市、縣地政機關未會同有關機關於徵收補償發給完竣一年內，依土地法第二百十五條第三項規定逕行除去改良物，亦未依同法第二百三十八條規定代

Therefore, where the condemner organization fails to utilize the land within the one-year period according to the expropriation plan, and such failure can be attributed to the landowner or persons occupying the land on behalf of the owner, then the relevant authorities cannot be held responsible for the delay. On the other hand, if, due to no fault of the landowner, utilization of the land is prevented by other land users unrelated to the owner, then the landowner shall not be deprived of the right to redeem his/her land, provided, however, that the municipal, county and relevant land authorities fail to, within the said one-year period, remove land improvements on their own account and on the land owner's account under Article 215, Paragraph 3, and Article 238 of the Land Act, and that the condemners fail to commence an action for compensation within the one-year period. The application of Article 219, Paragraph 3, of the Land Act falls within the scope of the foregoing explanation and does not contravene the Constitution.

為遷移改良物，開始使用土地；需用土地人於上開期間內復未依徵收計畫之使用目的提起必要之訴訟，以求救濟，應不妨礙原土地所有權人聲請收回其土地。土地法第二百十九條第三項規定之適用，於上開意旨範圍內，不生牴觸憲法之問題。

REASONING: The protection

解釋理由書：人民依法取得之

and restriction of the people's right to legally acquired land ownership are provided for in Article 143, Paragraph 1, of the Constitution. Expropriations of land are compulsory acquisitions by the government, through lawful procedures, for public utility purposes. The criteria and procedures for expropriation must conform to the principle of necessity stipulated in Article 23 of the Constitution. The condemners should, when expropriating lands pursuant to the procedures set by the Land Act, draft a detailed expropriation plan accompanied by relevant documents and apply for an approval in accordance with Articles 222 and 224, respectively, of the Land Act. Once the condemners have thereby acquired ownership of the private land, they should commence utilizing the land according to their plans in order to achieve the purpose for expropriation, that is, public utility. Article 219, Paragraph 1, Subparagraph 1, of the Land Act provides that where private lands are expropriated but not yet utilized, according to the plans, within one year after payment of expropriation compensation, then the original land owners may redeem their lands at the

土地所有權，應受法律之保障與限制，為憲法第一百四十三條第一項所明定。土地徵收係國家因公共事業之需要，對人民受憲法保障之財產權，經由法定程序予以強制取得之謂，相關法律所規定之徵收要件及程序，應符合憲法第二十三條所定必要性之原則。需用土地人依土地法所定徵收程序辦理徵收時，應預先依土地法第二百二十四條規定擬具詳細徵收計畫書，附具相關文書，依同法第二百二十二條規定聲請核辦，於合法取得人民之私有土地所有權後，即應按照徵收計畫開始使用，以實現公用需要之徵收目的。土地法第二百十九條第一項第一款規定，私有土地經徵收後，自徵收補償發給完竣屆滿一年，未依徵收計畫開始使用者，原土地所有權人得於徵收補償發給完竣屆滿一年之次日起五年內，向該管市、縣地政機關聲請照徵收價額收回其土地，即係防止徵收機關對不必要之徵收或未盡周詳之徵收計畫率行核准、或需用土地人遷延興辦公共事業，致有違徵收之正當性或必要性，因而特為原所有權人保留收回權。

expropriation price by applying to the relevant municipal or county land authorities within the statutory period of five years commencing from the day following the said one-year period. The purpose for reserving the right to redeem expropriated lands for land owners is to prevent approvals of unnecessary or inappropriate expropriation plans by the expropriation authorities and/or delays in constructing public utilities by condemners which are in conflict with the appropriateness and necessity of expropriation.

Therefore, where the condemners fail to utilize the land within the said one-year period according to the expropriation plan, and such failure can be attributed to the landowner or persons occupying the land on behalf of the owner, then the relevant authorities cannot be held responsible for the delay. On the other hand, if, due to no fault of the landowner, utilization of the land is prevented by other land users unrelated to the owner, then the landowner shall not be deprived of the right to redeem his/her land, provided, however that the municipal, county and

需用土地人未於上開一年期限內，依徵收計畫開始使用徵收之土地，如係因可歸責於原土地所有權人或為其占有該土地之使用人之事由所致，即不得將遷延使用徵收土地之責任，歸由需用土地人負擔；其不能開始使用係因可歸責於其他土地使用人之事由所致，而與原土地所有權人無涉者，若市、縣地政機關未會同有關機關於徵收補償發給完竣一年內，依土地法第二百十五條第三項規定逕行除去改良物，亦未依同法第二百三十八條規定代為遷移，開始使用土地；需用土地人於市、縣地政機關在上開期間內怠於行使公權力而為強制

relevant land authorities fail to, within the said one-year period, remove land improvements and commence utilizing the land on their own account and on the land owner's account under Article 215, Paragraph 3, and Article 238 of the Land Act. The reason for the foregoing is that it is unreasonable to deny the original land owners the right to redeem when the condemners fail to initiate an action for compensation against the relevant land authorities' delay in exercising their powers of expropriation within the said one-year period. That is, the original land owners shall not be responsible for the municipal and county land authorities' lack of initiative in executing the plan or the condemners' failure to exercise their rights. The application of Article 219, Paragraph 3, of the Land Act falls within the scope of the foregoing explanation and does not contravene the Constitution. The expropriated land that is the subject of the application for this Interpretation may not be redeemed by the original land owner by application according to this Interpretation if, before this Interpretation is promulgated, the land has been utilized and clas-

執行時，復未依徵收計畫之使用目的提起必要之訴訟，以求救濟，是以市、縣地政機關既未積極推行計畫內容，需用土地人又怠於行使權利，此際原土地所有權人若不得聲請收回土地，不啻將此不利益歸由原土地所有權人負擔，自應不妨礙收回權之行使。土地法第二百十九條第三項規定之適用，於上開意旨範圍內不生牴觸憲法問題。又本件聲請人據以聲請解釋涉及之土地經徵收後，如依本解釋意旨，得聲請收回其土地時，若在本解釋公布前，其土地已開始使用，闢為公用財產而為不融通物者，倘其收回於公益有重大損害，原土地所有權人即不得聲請收回土地，惟得比照開始使用時之徵收價額，依法請求補償相當之金額，併此說明。

sified as a public asset inaccessible to private citizens, and its redemption by the owner will be severely detrimental to public interests. It is explained here that the original landowner may only claim compensation of an amount based on the expropriation price at the time of initial utilization of the land.

Justice Sen-Yen Sun filed concurring opinion.

本號解釋孫大法官森焱提出協同意見書。

J. Y. Interpretation No.535（December 14, 2001）*

ISSUE: Are the relevant provisions of the Police Duty Act in respect of the execution of checkpoint searches in violation of the Constitution?

RELEVANT LAWS:

Article 5, Paragraph 1, Subparagraph 2, of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第五條第一項第二款）; Articles 3, 4, 5, 6, 7, 8, 9, 10 and 11, Subparagraph 3 of Police Duty Act（警察勤務條例第三條、第四條、第五條、第六條、第七條、第八條、第九條、第十條、第十一條第三款）; Articles 128 and 128-1 of the Code of Criminal Procedure（刑事訴訟法第一百二十八條、第一百二十八條之一）; Articles 2 and 3 of the Police Act（警察法第二條、第三條）.

KEYWORDS:

right to travel（行動自由）, property right（財產權）, right of privacy（隱私權）, principle of proportionality（比例原則）, police service（警察勤務）, police check（臨檢）, objection（異議）, administrative action（行政處分）, appeal（訴訟救濟）, substantial relationship（重要關聯性）.**

HOLDING: The Police Duty Act, whose provisions involve police ser-

解釋文：警察勤務條例規定警察機關執行勤務之編組及分工，並對執

* Translated by Dr. Wen-Chen Chang.

** Contents within frame, not part of the original text, are added for reference purpose only.

vices, organizations, and their division of labor as well as detailed methods by which police services are to be implemented, is not merely an organic act, but also legislation of a regulatory nature. According to Article 11, Subparagraph 3, of said Act, a police check is authorized as a way for police to facilitate law enforcement. However, the ways in which police checks are conducted including searches, street checks, and interrogations may have a great effect upon personal freedom, right to travel, property right and right of privacy and therefore such checks must be in accordance with the rule of law as well as legal principles guiding police functions and legal enforcement. Thus, to fully ensure the constitutional protection of people's fundamental rights and freedoms, the requirements and procedures of police checks as well as legal remedies for unlawful checks must be prescribed clearly in the law.

行勤務得採取之方式加以列舉，已非單純之組織法，實兼有行為法之性質。依該條例第十一條第三款，臨檢自屬警察執行勤務方式之一種。臨檢實施之手段：檢查、路檢、取締或盤查等不問其名稱為何，均屬對人或物之查驗、干預，影響人民行動自由、財產權及隱私權等甚鉅，應恪遵法治國家警察執勤之原則。實施臨檢之要件、程序及對違法臨檢行為之救濟，均應有法律之明確規範，方符憲法保障人民自由權利之意旨。

The relevant provisions concerning police checks in the aforementioned Act never delegate police unlimited authority to exercise any check, law enforcement or

上開條例有關臨檢之規定，並無授權警察人員得不顧時間、地點及對象任意臨檢、取締或隨機檢查、盤查之立法本意。除法律另有規定外，警察人員

interrogation without due consideration of time, place, manner and subjects. Unless prescribed otherwise in the law, the police shall limit checking authority to public transportation, public places, or other places where danger exists or may exist according to reasonable and objective judgment. Among these places, some places may be private residences that must be protected to the same extent as any home. Police shall not exercise checking authority over any persons unless there is a reasonable belief that actions taken by such persons have caused or may cause danger; and in so doing, police must abide by the principle of proportionality and not go beyond the degree of necessity. Before conducting any checks, police must inform the involved persons immediately of the reasons for exercising such checks and identify themselves clearly as law enforcement officers. Any police check must be conducted on the spot. If police do not obtain the consent of persons to be checked and, with no alternative to identify persons to be checked or conduct on-the-spot checks, they still conduct such checks, this may have harmful effects or

執行場所之臨檢勤務，應限於已發生危害或依客觀、合理判斷易生危害之處所、交通工具或公共場所為之，其中處所為私人居住之空間者，並應受住宅相同之保障；對人實施之臨檢則須以有相當理由足認其行為已構成或即將發生危害者為限，且均應遵守比例原則，不得逾越必要程度。臨檢進行前應對在場者告以實施之事由，並出示證件表明其為執行人員之身分。臨檢應於現場實施，非經受臨檢人同意或無從確定其身分或現場為之對該受臨檢人將有不利影響或妨礙交通、安寧者，不得要求其同行至警察局、所進行盤查。其因發現違法事實，應依法定程序處理者外，身分一經查明，即應任其離去，不得稽延。前述條例第十一條第三款之規定，於符合上開解釋意旨範圍內，予以適用，始無悖於維護人權之憲法意旨。現行警察執行職務法規有欠完備，有關機關應於本解釋公布之日起二年內依解釋意旨，且參酌社會實際狀況，賦予警察人員執行勤務時應付突發事故之權限，俾對人民自由與警察自身安全之維護兼籌並顧，通盤檢討訂定，併此指明。

may impede traffic flow and interfere with social tranquility. Moreover, police are not permitted to ask checked persons to go to a police station for further interrogation. After the identification of such persons has been confirmed, police should permit them to leave without delay unless they are suspected of having committed a crime, in which case criminal law procedures should be followed. Insofar as construed and applied, Article 11, Subparagraph 3, of the aforementioned Act is read as constitutional and not inconsistent with the constitutional protection of human rights. Nonetheless, the current laws concerning police law enforcement are not sufficient; therefore, the competent government agencies should review relevant provisions, taking into consideration this interpretation as well as social circumstances, and enact new laws within two years after the release of this interpretation, which would allow police to deal with unexpected occurrences in law enforcement while sufficiently ensuring people's freedom and their own safety.

REASONING: Pursuant to Arti-

解釋理由書：按人民於其憲法

cle 5, Paragraph 1, Subparagraph 2, of the Constitutional Interpretation Procedure Act, a person whose constitutional right is illegally infringed upon and who has put forward litigation according to legal procedures may apply for constitutional interpretation on the ground that the law or regulation applied in the final case is in conflict with the Constitution. Whether the so-called "law or regulation applied in the final case" is in violation of the Constitution has substantial relation to the judgment. Taking criminal judgments as an example, the purpose of constitutional interpretation is not limited to substantive laws or procedures applied to determine the crime and prison term in the verdict, but it also includes the laws or regulations used to judge the illegality of concerned behaviors as well. With regard to the criminal judgment concerning this interpretation, whether the applicant, the defendant in the criminal judgment, would be found guilty of insulting government officials legally enforcing their duties on the spot depends on whether the insulted government officials are legally enforcing their duties at that time. The judgment

上所保障之權利，遭受不法侵害，經依法定程序提起訴訟，對於確定終局裁判所適用之法律或命令發生有牴觸憲法之疑義者，得聲請解釋憲法，司法院大法官審理案件法第五條第一項第二款定有明文。所謂裁判所適用之法律或命令，係指法令之違憲與否與該裁判有重要關聯性而言。以刑事判決為例，並不限於判決中據以論罪科刑之實體法及訴訟法之規定，包括作為判斷行為違法性依據之法令在內，均得為聲請釋憲之對象。就本聲請案所涉之刑事判決而論，聲請人（即該刑事判決之被告）是否成立於公務員依法執行職務時當場侮辱罪，係以該受侮辱之公務員當時是否依法執行職務為前提，是該判決認定其係依法執行職務所依據之法律─警察勤務條例相關規定，即與該判決有重要關聯性，而得為聲請釋憲之客體，合先說明。

grounded its findings of legal duty enforcement on the stipulations in the Police Duty Act, which, therefore, is substantially related to the judgment and is considered here as the object of interpretation.

Article 2 of the Police Act provides that the duties of police are to maintain public order according to law, to protect social security, to prevent any harm, and finally to promote people's welfare. Article 3 provides that the establishment of the police services system belongs to the jurisdiction of the national legislature. Articles 3 to 10 of the Police Duty Act are concerned with police services, organizations, division of duty, and the command system. Article 11 enumerates the ways police services are to be implemented; therefore, it has the characteristics of an organic act and a legislation of regulatory nature. In performing their duties, the administrative agencies should not only consider the stipulations concerning their power in the organic act, but also the delegation by legislations of regulatory nature, so as to be in conformance to the rule of law principle. Since the Police

警察法第二條規定警察之任務為依法維持公共秩序，保護社會安全，防止一切危害，促進人民福利。第三條關於警察之勤務制度定為中央立法事項。警察勤務條例第三條至第十條乃就警察執行勤務之編組、責任劃分、指揮系統加以規範，第十一條則對執行勤務得採取之方式予以列舉，除有組織法之性質外，實兼具行為法之功能。查行政機關行使職權，固不應僅以組織法有無相關職掌規定為準，更應以行為法（作用法）之授權為依據，始符合依法行政之原則，警察勤務條例既有行為法之功能，尚非不得作為警察執行勤務之行為規範。依該條例第十一條第三款：「臨檢：於公共場所或指定處所、路段，由服勤人員擔任臨場檢查或路檢，執行取締、盤查及有關法令賦予之勤務」，臨檢自屬警察執行勤務方式之一種。惟臨檢實施之手段：檢查、路檢、取締或盤查等不問其名稱為何，均屬對人或物之查驗、干預，影響人民行動自由、財產

Duty Act serves the function of an organic act, it may be regarded as a general norm of police services. According to Article 11, Subparagraph 3, of said Act, an on-the-spot police check involves police officers executing checks or street checks to enforce the law, interrogate persons, and execute other duties in public or other designated places or roads, as delegated by relevant laws and regulations. Thus, a police check is authorized as a way of legal enforcement. However, the ways in which a police check is performed including search, street check, and interrogation may have a great effect upon personal freedom, property right and right of privacy. According to laws (such as Articles 128 and 128-1 of the Code of Criminal Procedure), before searching those suspected of having committed a crime, the police must obtain warrants from the court. Therefore, when police checks whose purposes are only for maintaining public order and preventing harm are executed, undoubtedly the legislators do not intend to authorize the police to execute police checks at will. When executing various police checks, police officers must

權及隱私權等甚鉅。人民之有犯罪嫌疑而須以搜索為蒐集犯罪證據之手段者，依法尚須經該管法院審核為原則（參照刑事訴訟法第一百二十八條、第一百二十八條之一），其僅屬維持公共秩序、防止危害發生為目的之臨檢，立法者當無授權警察人員得任意實施之本意。是執行各種臨檢應恪遵法治國家警察執勤之原則，實施臨檢之要件、程序及對違法臨檢行為之救濟，均應有法律之明確規範，方符憲法保障人民自由權利之意旨。

abide by the rule of law as well as legal principles guiding police functions and legal enforcement. Thus, to fully ensure the constitutional protection of people's fundamental rights and freedoms, the requirements and procedures of police checks as well as legal remedies for unlawful checks must be prescribed clearly by the law.

The relevant provisions concerning police checks in the aforementioned Act never delegate police unlimited power to exercise any check, law enforcement or interrogation without due consideration of time, place, manner and subjects. Unless prescribed otherwise in other laws (such as the Code of Criminal Procedure, Administrative Execution Act, or Social Order Maintenance Act), in executing checks, the police must limit their authority to public transportation, public places, or other places where there has been a danger or may be a danger according to reasonable and objective judgment. Among these places, some may be private residences that must be protected to the same extent as any home [See note

上開條例有關臨檢之規定，既無授權警察人員得不顧時間、地點及對象任意臨檢、取締或隨機檢查、盤查之立法本意。除法律另有規定（諸如刑事訴訟法、行政執行法、社會秩序維護法等）外，警察人員執行場所之臨檢勤務，應限於已發生危害或依客觀、合理判斷易生危害之處所、交通工具或公共場所為之，其中處所為私人居住之空間者，並應受住宅相同之保障；對人實施之臨檢則須以有相當理由足認其行為已構成或即將發生危害者為限，且均應遵守比例原則，不得逾越必要程度，儘量避免造成財物損失、干擾正當營業及生活作息。至於因預防將來可能之危害，則應採其他適當方式，諸如：設置警告標誌、隔離活動空間、建立戒備措施及加強可能遭受侵害客體之保護等，尚不

above.]. Police shall not exercise checking authority over persons unless there is a reasonable belief that actions taken by such persons have caused or may cause harm; and in so doing, police officers must abide by the principle of proportionality, not go beyond the degree of necessity, and try their best to avoid causing damage to property and interfering with legitimate operations and the people's way of life. In order to prevent possible danger in the future, the police should employ other proper methods, such as setting up warning signs, partitioning off designated areas, establishing alerting measures, and reinforcing protections of the objects which would probably be damaged, instead of executing police checks or interrogating persons directly. Before exercising any checks, the police must inform the involved persons immediately, including those who will be checked, owners of public places, vehicles, or places, and users, the reasons for exercising such checks and identify themselves clearly as law enforcement officers. Any police check must be conducted on the spot. If police do not obtain the con-

能逕予檢查、盤查。臨檢進行前應對受臨檢人、公共場所、交通工具或處所之所有人、使用人等在場者告以實施之事由，並出示證件表明其為執行人員之身分。臨檢應於現場實施，非經受臨檢人同意或無從確定其身分或現場為之對該受臨檢人將有不利影響或妨礙交通、安寧者，不得要求其同行至警察局、所進行盤查。其因發現違法事實，應依法定程序處理者外，身分一經查明，即應任其離去，不得稽延。前述條例第十一條第三款於符合上開解釋意旨範圍內，予以適用，始無悖於維護人權之憲法意旨。又對違法、逾越權限或濫用權力之臨檢行為，應於現行法律救濟機制內，提供訴訟救濟（包括賠償損害）之途徑：在法律未為完備之設計前，應許受臨檢人、利害關係人對執行臨檢之命令、方法、應遵守之程序或其他侵害利益情事，於臨檢程序終結前，向執行人員提出異議，認異議有理由者，在場執行人員中職位最高者應即為停止臨檢之決定，認其無理由者，得續行臨檢，經受臨檢人請求時，並應給予載明臨檢過程之書面。上開書面具有行政處分之性質，異議人得依法提起行政爭訟。現行警察執行職務法規有欠完備，有關機關應於本解釋公布之日起二年內依解釋意

sent of persons to be checked and, with no alternative to identify such persons or conduct such on-the-spot checks, they still conduct such checks, this may have harmful effects or impede traffic flow and disturb social tranquility. Moreover, the police are not permitted to ask the checked persons to go to the police station for further interrogation. After the police have confirmed their identification, the checked persons should be allowed to leave without delay unless they are suspected of crimes that would be followed up by criminal law procedures. Insofar as construed and applied, Article 11, Subparagraph 3, of the Police Duty Act is read as constitutional and not inconsistent with the constitutional protection of human rights. As for illegal, unauthorized or abusive police checks, people should be able to petition for relief (including monetary compensation) under the current legal remedy mechanism. Before there is a proper legal mechanism, people must have access to filing complaints against police checks, their methods, processes, or other potentially harmful effects. If the complaint is deemed reasonable, the high-

旨，且參酌社會實際狀況，賦予警察人員執行勤務時應付突發事故之權限，俾對人民自由與警察自身安全之維護兼籌並顧，通盤檢討訂定，併此指明。

est ranking executor in place should immediately suspend the police check. If the complaint is deemed unreasonable, the check may continue, but a written document specifying checking procedures should be issued upon request to those who are being checked. The aforementioned written document is considered as an administrative action to be appealed further to the courts. The current laws concerning police law enforcement are not sufficient, and, therefore, government agencies should review relevant provisions, taking into consideration this interpretation as well as social circumstances, and enact new laws, within two years after the release of this interpretation, which would allow the police to deal with unexpected occurrences in law enforcement while sufficiently protecting people's freedom and their own safety.

J. Y. Interpretation No.536（December 28, 2001）*

ISSUE: Does the MOF letter stating that the shares of an unlisted company inherited or given as gifts shall be appraised based on the company's net asset value as of the date of inheritance or gift contravene the peoples' property right as protected by the Constitution?

RELEVANT LAWS:

Articles 15 and 19 of the Constitution（憲法第十五條、第十九條）; Articles 4 , Paragraph 1, and 10, Paragraph 1, of the Estate and Gift Taxes Act（遺產及贈與稅法第四條第一項、第十條第一項）; Articles 28, Paragraph 1, and 29 of the Enforcement Rules of the Estate and Gift Taxes Act（遺產及贈與稅法施行細則第二十八條第一項、第二十九條）.

KEYWORDS:

decedent estate（遺產）, gift（贈與）, listed securities（上市證券）, over-the-counter securities（上櫃證券）, unlisted companies（未上市公司）, companies not yet traded in the over-the-counter market（未上櫃公司）.**

HOLDING: Article 10, Paragraph 1, of the Estate and Gift Taxes Act provides: "valuation of a decedent's estate

解釋文：遺產及贈與稅法第十條第一項規定：「遺產及贈與財產價值之計算，以被繼承人死亡時或贈與人贈

* Translated by Wei-Feng Huang.

** Contents within frame, not part of the original text, are added for reference purpose only.

and gifts is based on the value of such property on the date of the decedent's death or date of gift." For the purpose of proper valuation in accordance with the foregoing provision, Article 28, Paragraph 1, of the Enforcement Rules of the Estate and Gift Taxes Act states: "appraisal of marketable securities which have been listed on the Stock Exchange (hereinafter referred to as "listed securities") or have been traded in the over-the-counter market (hereinafter referred to as "OTC securities") shall be based on the closing price of such securities as of the date of inheritance or gift." Further, in the said Enforcement Rules, Article 29 Paragraph 1, provides: "unless otherwise provided in Paragraph 2 of the preceding Article, appraisal of securities of companies limited by shares which have not been listed on the Stock Exchange nor traded in the OTC market (collectively referred to as "shares not traded in the open market") shall be based on the said company's net asset value as of the date of inheritance or gift," the reason being that securities of companies not yet traded in the open market usually yield no transaction record as of

與時之時價為準。」為執行上開條文所定時價之必要，同法施行細則第二十八條第一項乃明定：「凡已在證券交易所上市（以下稱上市）或證券商營業處所買賣（以下稱上櫃）之有價證券，依繼承開始日或贈與日該項證券之收盤價估定之。」又同細則第二十九條第一項：「未上市或上櫃之股份有限公司股票，除前條第二項規定情形外，應以繼承開始日或贈與日該公司之資產淨值估定之」，係因未上市或未上櫃公司股票，於繼承或贈與日常無交易紀錄，或縱有交易紀錄，因非屬公開市場之買賣，難以認定其客觀市場價值而設之規定。是於計算未上市或上櫃公司之資產時，就其持有之上市股票，因有公開市場之交易，自得按收盤價格調整上市股票價值，而再計算其資產淨值。財政部中華民國七十九年九月六日台財稅字第七九〇二〇一八三三號函：「遺產及贈與稅法施行細則第二十九條規定『未公開上市之公司股票，以繼承開始日或贈與日該公司之資產淨值估定之』。稽徵機關於核算該法條所稱之資產淨值時，對於公司轉投資持有之上市公司股票價值，應依遺產及贈與稅法施行細則第二十八條規定計算」，乃在闡明遺產及贈與稅法施行細則第二十九條規定，符合遺產

the date of inheritance or gift. The existence of such a record, if any, cannot be taken as representing the fair market value since it is not an open market sale. When assessing the assets of a company not yet traded in the open market, the company's net asset value is assessed by taking into consideration the value of listed shares held by the company as adjusted to their closing price (since they are subject to open-market transactions). Letter No. 790201833 of September 6, 1990, issued by the Ministry of Finance explains: "Article 29 of the Enforcement Rules of the Estate and Gift Taxes Act provides that 'shares of unlisted companies shall be appraised based on the company's net asset value as of the date of inheritance or gift.' When assessing the net asset value referred to in the foregoing Article, the tax authority should value the company's reinvestment in listed shares in accordance with Article 28 of the Enforcement Rules of the Estate and Gift Taxes Act." The foregoing is an attempt by the Ministry of Finance to explain the compliance of Article 29 of the Enforcement Rules of the Estate and Gift Taxes Act with the legisla-

及贈與稅法第十條第一項之立法意旨，與憲法第十九條所定租稅法律主義及第十五條所保障人民財產權，尚無牴觸。惟未上市或上櫃公司之股票價值之估算方法涉及人民之租稅負擔，仍應由法律規定或依法律授權於施行細則訂定，以貫徹上揭憲法所規定之意旨。

tive intention of Article 10, Paragraph 1, of the Estate and Gift Taxes Act. Further, it is consistent with the citizen's duty to pay tax and the right to property under Articles 15 and 19, respectively, of the Constitution. The appraisal of securities of companies not yet traded in the open market affects the people's tax liability. It should therefore be governed by law or by enforcement rules ordained by law in order to fulfill the legislative intention set out in the Constitution.

REASONING: All citizens have the duty to pay tax under Article 19 of the Constitution. In order to give effect to provisions in the empowering statutes, regulatory authorities must either make enforcement rules as authorized by the empowering statutes, or explain the legislative intention behind the empowering statutes and their rules of enforcement. Article 4, Paragraph 1, of the Estate and Gift Taxes Act states that "property in this Act refers to movable and immovable property and any other interest in the property." Valuation of such property is provided for in Article 10, Paragraph 1, of

解釋理由書：人民有依法納稅之義務，為憲法第十九條所明定。主管機關為執行母法有關事項之必要，得依法律之授權訂定施行細則，或對母法及施行細則之規定為闡明其規範意旨之釋示。遺產及贈與稅法第四條第一項規定：「本法稱財產，指動產、不動產及其他一切有財產價值之權利。」關於財產價值之計算，同法第十條第一項規定：「遺產及贈與財產價值之計算，以被繼承人死亡時或贈與人贈與時之時價為準；被繼承人如係受死亡之宣告者，以法院宣告死亡判決內所確定死亡日之時價為準。」為執行上開條文所定時價之必要，同法施行細則第二十八條乃明

the aforementioned Act as: "valuation of a decedent's estate and gifts is based on the value of such property on the date of decedent's death or date of gift. Where the court has declared the decedent's death, the date for valuation should be the date so declared in the judgment." For the purpose of proper valuation in accordance with the foregoing provision, Article 28, Paragraph 1, of the Enforcement Rules of the said Act holds: "appraisal of marketable securities being listed securities or OTC securities shall be based on the closing price of such securities as of the date of inheritance or gift. But if there is no price of sale or purchase on such date, valuation shall be based on the last closing price immediately preceding the date of inheritance or gift. Where there is a major price fluctuation, the appraisal shall be based on the average closing price for the one-month period immediately preceding the date of inheritance or gift. The appraisal of securities first offered to the public, for the period between the approval by the securities authority of the contract pertaining to the said offer, and its first offer to the public, shall be based

定：「凡已在證券交易所上市（以下稱上市）或證券商營業處所買賣（以下稱上櫃）之有價證券，依繼承開始日或贈與日該項證券之收盤價估定之。但當日無買賣價格者，依繼承開始日或贈與日前最後一日收盤價估定之，其價格有劇烈變動者，則依其繼承開始日或贈與日前一個月內各日收盤價格之平均價格估定之。有價證券初次上市或上櫃者，於其契約經證券主管機關核准後，至掛牌買賣前，應依繼承開始日或贈與日該項證券之承銷價格或推薦證券商認購之價格估定之。」又依同細則第二十九條第一項：「未上市或上櫃之股份有限公司股票，除前條第二項規定情形外，應以繼承開始日或贈與日該公司之資產淨值估定之。非股份有限公司組織之事業，其出資價值之估價準用前項規定。」之所以設此規定，係因未上市或未上櫃公司股票，於繼承或贈與日常無交易紀錄，或縱有交易紀錄，因非屬公開市場之買賣，難以認定其客觀之市場價值。是於計算未上市或上櫃公司之資產時，就其持有之上市股票，因有公開市場之交易，自得按收盤價格調整上市股票價值，而再計算其資產淨值。對未上市或上櫃公司持有之上市公司之股票，若僅依原公司帳載成本計算，則不同之未上

on its consignment price or the recommending stock broker's acquisition price on the date of inheritance or gift." According to Article 29, Paragraph 1, of the same Enforcement Rules: "unless otherwise provided in Paragraph 2 of the preceding Article, appraisal of securities of companies limited by shares which have not been traded in the open market shall be based on the company's net asset value as of the date of inheritance or gift. The same applies for the appraisal of contribution value for business organizations not limited by shares." The reason for the foregoing provision is because the securities of companies not yet traded in the open market usually yield no transaction record on the date of inheritance or gift. The existence of such a record, if any, cannot be taken as representing the fair market value since it is not an open market sale. Therefore when assessing the assets of a company not yet traded in the open market, the company's net asset is assessed by taking into consideration the value of listed shares held by the company as adjusted by their closing price (since they are subject to open-market transac-

市或上櫃公司持有相同之上市股票，將因不同時點購買成本之不同而產生不同之估價，有違課稅公平原則。財政部中華民國七十九年九月六日台財稅字第七九〇二〇一八三三號函：「遺產及贈與稅法施行細則第二十九條規定『未公開上市之公司股票，以繼承開始日或贈與日該公司之資產淨值估定之』。稽徵機關於核算該法條所稱之資產淨值時，對於公司轉投資持有之上市公司股票價值，應依遺產及贈與稅法施行細則第二十八條規定計算」，乃在闡明遺產及贈與稅法施行細則第二十九條之規定，符合遺產及贈與稅法第十條第一項之立法意旨，與憲法第十九條所定租稅法律主義及第十五條所保障人民財產權，尚無牴觸。惟未上市或上櫃公司之股票價值之估算方法涉及人民之租稅負擔，仍應由法律規定或依法律授權於施行細則訂定，以貫徹上揭憲法所規定之意旨。

tions). The valuation of listed securities, held by companies not traded in the open market, based on the company's book cost would be in conflict with the principle of fair tax. The reason being that the same listed securities held by different companies not traded in the open market will have different appraisal values due to the difference in cost depending on the time of purchase. Letter No. 790201833 of September 6, 1990, issued by the Ministry of Finance explains: "Article 20 of the Enforcement Rules of the Estate and Gift Taxes Act provides that 'shares of unlisted companies shall be appraised based on the company's net asset as of the date of inheritance or gift.' When assessing the net asset value referred to in the foregoing Article, the tax authority should value the company's reinvestment in listed shares in accordance with Article 28 of the Enforcement Rules of the Estate and Gift Taxes Act." The foregoing is an attempt by the Ministry of Finance to explain the compliance of Article 29 of the Enforcement Rules of the Estate and Gift Taxes Act with the legislative intention in Article 10 of the Estate and Gift Taxes

Act. Further, it is consistent with the citizen's duty to pay tax and right to property under Articles 15 and 19, respectively, of the Constitution. The method of appraisal for securities of companies not yet traded in the open market affects the people's tax liability. It should therefore be governed by law or by enforcement rules authorized by such law in order to fulfill the legislative intention set out in the Constitution.

The applicant asserts that the adoption, for the calculation of tax, of the Ministry of Finance's explanation of September 6, 1990, by the relevant taxation authority violates the principle against retroactive application of law since the taxable events occurred in April and August 1990. This Yuan finds that the explanations given by regulatory authorities in regard to administrative laws seek to clarify the purposes of the relevant law and shall be applicable as of the proclamation date of the law. The foregoing has already been determined in this Yuan's Interpretation No. 287 and it must be clarified that their application does not contravene the Constitution.

聲請人以其課稅事實發生於七十九年四月及八月間，而主管稽徵機關竟引用財政部同年九月六日前開函釋為計算方法，指摘其有違法令不溯及既往原則乙節，查行政主管機關就行政法規所為之釋示，係闡明法規之原意者，應自法規生效之日起有其適用，業經本院釋字第二八七號解釋釋示在案，自不生牴觸憲法之問題，併此指明。

J. Y. Interpretation No.537（January 11, 2002）*

ISSUE: Does the MOF letter requiring the taxpaying house/building owner to report to the local tax collection authority the utilization condition of such house/building before being entitled to a 50% discount in housing tax contradict the principle of taxation by law as provided in the Constitution?

RELEVANT LAWS:

Articles 7, 15, Paragraph 2, Subparagraph 2, of the House Tax Act（房屋稅條例第七條、第十五條第二項第二款）; Article 30 of the Tax Levy Act（稅捐稽徵法第三十條）; Article 41 of the Land Tax Act（土地稅法第四十一條）; Article 24 of the Regulation Governing the Reduction or Exemption of Land Tax（土地稅減免規則第二十四條）.

KEYWORDS:

tax levy（稅捐稽徵）, tax relief（稅捐減免）, business tax rate（營業用稅率）, factory registration certificate（工廠登記證）, principle of tax per legislation（租稅法律原則）.**

HOLDING: According to Article 15, Paragraph 2, Subparagraph 2, of the House Tax Act as amended and promulgated on July 30, 1993, a private house/

解釋文：合法登記之工廠供直接生產使用之自有房屋，依中華民國八十二年七月三十日修正公布施行之房屋稅條例第十五條第二項第二款規定，其

* Translated by Dr. C.Y. Huang of Tsar & Tsai Law Firm.

** Contents within frame, not part of the original text, are added for reference purpose only.

building used for manufacturing purposes owned by a duly registered factory should be entitled to a 50% discount in housing tax. Article 7 of the said Act also provides: "A taxpayer shall, within 30 days from the date on which construction of a house/building is completed, report to the local tax collection authority the current value of such house/building and its utilization condition. The aforesaid shall also apply to the cases of extension, reconstruction, any change in utilization, creation of dien right or transfer of ownership of the house/building." The tax collection authority shall in principle conduct investigations at its own initiative during tax collection processes. However, most taxable conditions occur within the control of taxpayers, and it is difficult for the tax collection authority to ascertain all the details on its own. To achieve the goal of fairness and legitimacy in tax, taxpayers are obliged to assist by reporting the required information. The letter Ref. No. Taiwan-Finance-Tax-36712 issued by the Ministry of Finance (MOF) on September 9, 1982, states: "According to the provisions of Article 7 of the House Tax Act,

房屋稅有減半徵收之租稅優惠。同條例第七條復規定：「納稅義務人應於房屋建造完成之日起三十日內，向當地主管稽徵機關申報房屋現值及使用情形；其有增建、改建、變更使用或移轉承典時亦同」。此因租稅稽徵程序，稅捐稽徵機關雖依職權調查原則而進行，惟有關課稅要件事實，多發生於納稅義務人所得支配之範圍，稅捐稽徵機關掌握困難，為貫徹公平合法課稅之目的，因而課納稅義務人申報協力義務。財政部七十一年九月九日台財稅第三六七一二號函所稱：「依房屋稅條例第七條之規定，納稅義務人所有之房屋如符合減免規定，應將符合減免之使用情形並檢附有關證件（如工廠登記證等）向當地主管稽徵機關申報，申報前已按營業用稅率繳納之房屋稅，自不得依第十五條第二項第二款減半徵收房屋稅」，與上開法條規定意旨相符，於憲法上租稅法律主義尚無牴觸。

where a house/building is eligible for tax relief, the taxpaying owner shall report to the local tax collection authority the utilization conditions eligible for tax relief, together with relevant papers (such as factory registration certificate, etc.). The 50% discount in housing tax provided in Article 15, Paragraph 2, Subparagraph 2, of the Act does not apply to the housing tax already paid at the business tax rate prior to the aforesaid report." This is in alignment with the above Article and does not contradict the principle of taxation by law provided in the Constitution.

REASONING: According to Article 15, Paragraph 2, Subparagraph 2, of the House Tax Act as amended and promulgated on July 30, 1993 (this remains unchanged in the said Act as amended and promulgated on June 20, 2001, and put into effect on July 1, 2001), a private house/building used for manufacturing purposes owned by a duly registered factory shall be entitled to a 50% discount in housing tax. Article 7 of the said Act also provides: "A taxpayer shall, within 30 days from the date on which

解釋理由書：合法登記之工廠，供直接生產使用之自有房屋，依八十二年七月三十日修正公布施行之房屋稅條例第十五條第二項第二款規定（九十年六月二十日修正公布，同年七月一日施行之現行法同條項規定不變），其房屋稅有減半徵收之租稅優惠。同條例第七條復規定：「納稅義務人應於房屋建造完成之日起三十日內，向當地主管稽徵機關申報房屋現值及使用情形；其有增建、改建、變更使用或移轉承典時亦同」（現行法同條規定意旨亦同）。此因稅捐稽徵機關依稅捐稽徵法第三十

construction of a house/building is completed, report to the local tax collection authority the current value of such house/building and its utilization conditions. The aforesaid shall also apply to the cases of extension, reconstruction, any change in utilization, the creation of dien right or transfer of ownership of the house/building" (this remains unchanged in the current said Act). Under Article 30 of the Tax Levy Act, the tax collection authority may conduct investigations on relevant institutions, groups or individuals for information pertaining to tax collection, and the subject party shall not refuse such investigation. The tax collection authority shall in principle conduct such investigations at its initiative during tax collection processes and shall make use of all necessary and available information required for clarifying facts, so as to verify the facts and levy taxes accordingly. However, the tax collection authority has to process a heavy and complex case load. Furthermore, most taxable conditions occur within the control of taxpayers, and the taxpayers are the ones who know best about the items eligible for tax relief. If

條之規定，為調查課稅資料，得向有關機關、團體或個人進行調查，且受調查者不得拒絕。於稽徵程序中，本得依職權調查原則進行，應運用一切闡明事實所必要以及可獲致之資料，以認定真正之事實課徵租稅。惟稅捐稽徵機關所須處理之案件多而繁雜，且有關課稅要件事實，類皆發生於納稅義務人所得支配之範圍，其中得減免事項，納稅義務人知之最詳，若有租稅減免或其他優惠情形，仍須由稅捐稽徵機關不待申請一一依職權為之查核，將倍增稽徵成本。因此，依憲法第十九條「人民有依法律納稅之義務」規定意旨，納稅義務人依個別稅捐法規之規定，負有稽徵程序之申報協力義務，實係貫徹公平及合法課稅所必要。觀諸土地稅法第四十一條、土地稅減免規則第二十四條相關土地稅減免優惠規定，亦均以納稅義務人之申請為必要，且未在期限前申請者，僅能於申請之次年適用特別稅率。而現行房屋稅條例第十五條第三項修正為「依第一項第一款至第八款、第十款、第十一款及第二項規定減免房屋稅者，應由納稅義務人於減免原因、事實發生之日起三十日內申報當地主管稽徵機關調查核定之；逾期申報者，自申報日當月份起減免。」亦同此意旨，此一納稅義務人之

the tax collection authority has to investigate and review all the conditions eligible for tax relief or other favorable treatments on its own without report from taxpayers, the cost for tax collection will multiply. Article 19 of the Constitution stipulates: "The people shall have the duty of paying tax in accordance with the law." Accordingly, taxpayers are obliged to assist by reporting the required information in accordance with respective tax laws and regulations, so as to achieve the goal of fairness and legitimacy in taxation. Article 41 of the Land Tax Act, and the provisions for tax relief and favorable treatments regarding land tax in Article 24 of the Regulation Governing the Reduction or Exemption of Land Tax also contain the precondition of report by taxpayers; those who fail to apply for tax relief before the deadline can only become eligible for the special tax rates in the year following the said application. According to the amended Paragraph 3 of Article 15 of the current House Tax Act: "In case of tax relief for house tax per Subparagraphs 1-8, 10, 11 of Paragraph 1 and Paragraph 2, the taxpayer shall report to the local tax

申報義務實為適用優惠稅率規定所必要之稽徵程序。財政部七十一年九月九日台財稅第三六七一二號函所稱：「依房屋稅條例第七條之規定，納稅義務人所有之房屋如符合減免規定，應將符合減免之使用情形並檢附有關證件（如工廠登記證等）向當地主管稽徵機關申報，申報前已按營業用稅率繳納之房屋稅，自不得依第十五條第二項第二款減半徵收房屋稅」，符合前述法條之立法意旨，於憲法上租稅法律主義尚無牴觸。

collection authority within 30 days upon occurrence of the legitimate reason and facts for verification; where the taxpayer fails to file such report prior to the deadline, the tax relief will be applicable starting on the date of report." The purpose is the same, that the obligation of report by the taxpayer is necessary during the tax collection processes, regarding eligibility for favorable tax rates. The letter Ref. No. Taiwan-Finance-Tax-36712 issued by the Ministry of Finance (MOF) on September 9, 1982, states: "According to the provisions of Article 7 of the House Tax Act, where a house/building is eligible for tax relief, the taxpaying owner shall report to the local tax collection authority the utilization conditions eligible for tax relief, together with relevant papers (such as factory registration certificate, etc.). The 50% discount in housing tax provided in Article 15, Paragraph 2, Subparagraph 2, of the Act does not apply to the housing tax already paid at the business tax rate prior to the aforesaid report." This is in alignment with the above Article and does not contradict the principle of taxation by law provided in the Constitution.

J. Y. Interpretation No.538（January 22, 2002）*

ISSUE: Is the relevant provision of the Regulation on the Supervision of the Construction Business regarding the replacement of registration certificates for the construction business in former war zones consistent with the principles of equality and legitimate reliance?

RELEVANT LAWS:

Articles 7, 15, and 23 of the Constitution（憲法第七條、第十五條、第二十三條）; J. Y. Interpretation Nos. 394, 514 and 525（司法院釋字第三九四號、第五一四號、第五二五號解釋）; Article 15, Paragraph 2, of the Construction Act（建築法第十五條第二項）; Articles 7, 8, 9, 16 and 45-1 of the Regulation on the Supervision of the Construction Business（營造業管理規則第七條、第八條、第九條、第十六條第四十五條之一）; Implementing Rules for the Supervision of Construction Business issued by the Kinmen War Zone Executive Committee（金門戰地政務委員會管理營造業實施規定）; Provisional Rules for the Supervision of the Construction Business issued by Lianjiang County（連江縣營造業管理暫行規定）.

KEYWORDS:

principle of equality（平等原則）, principle of proportional-

* Translated by Vincent C. Kuan.

** Contents within frame, not part of the original text, are added for reference purpose only.

ity（比例原則）, freedom to run business（營業自由）, legitimate reliance（信賴保護）, classification of the construction industry（營造業分級）, transitional period（過渡期間）, principle of express delegation（授權明確性原則）.**

HOLDING: It is provided in Article 15, Paragraph 2, of the Construction Act that "the regulations governing the supervision of the construction business shall be prescribed by the Ministry of the Interior," thus generally delegating the power to the Ministry of the Interior to prescribe the regulations governing the supervision of the construction business. Such clause of delegation, though failing to specify the contents and scope of such delegation, can nevertheless enable one to infer from the construction of the law as a whole that the lawmakers have intended to authorize the authority-in-charge, based on its administrative and professional considerations, to set forth such rules and regulations governing the construction business as the requirements for the registration of such business, the guidelines for the construction business and personnel

解釋文：建築法第十五條第二項規定：「營造業之管理規則，由內政部定之」，概括授權訂定營造業管理規則。此項授權條款雖未就授權之內容與範圍為規定，惟依法律整體解釋，應可推知立法者有意授權主管機關，就營造業登記之要件、營造業及其從業人員準則、主管機關之考核管理等事項，依其行政專業之考量，訂定法規命令，以資規範（本院釋字第三九四號解釋參照）。內政部於中華民國八十二年六月一日修正公布之營造業管理規則第七條、第八條與第九條，對於申請登記之營造業，依資本額之大小、專業工程人員之員額，以及工程實績多寡等條件，核發甲、乙、丙三等級之登記證書，並按登記等級分別限制其得承攬工程之限額（同規則第十六條參照），係對人民營業自由所設之規範，目的在提高營造業技術水準，確保營繕工程施工品質，以維護人民生命、身體及財產安全，為

employed by such business, the matters subject to evaluation and supervision by the authority-in-charge and so on. (Reference may be made to J. Y. Interpretation No. 394). Under Articles 7, 8 and 9 of the Regulation on the Supervision of the Construction Business, as amended and promulgated by the Ministry of the Interior on June 1, 1993, a registration certificate in the form of either Grade A, Grade B or Grade C shall be issued to a construction business filing for registration, based on such conditions of the individual business as the size of its capital, the number of qualified engineers employed by the business, and the amount of previous revenues generated by the same, etc., and, based on the grade specified in such certificate, the construction business is allowed to undertake construction projects subject to the restrictions on the scale and value of such projects (refer to Article 16 of the said Regulation). Such norms, which impose restrictions on the freedom of the people to run business, are necessary to enhance public interests and to ensure the safety of the people and their properties by improving the technological

增進公共利益所必要。又同規則增訂之第四十五條之一規定：「福建省金門縣、連江縣依金門戰地政務委員會管理營造業實施規定、連江縣營造業管理暫行規定登記之營造業，應於中華民國八十二年六月一日本規則修正施行日起三年內，依同日修正施行之第七條至第九條之規定辦理換領登記證書，逾期未辦理換領者，按其與本規則相符之等級予以降等或撤銷其登記證書」，乃因八十一年十一月七日福建省金門縣及連江縣戰地政務解除後，營造業原依金門戰地政務委員會管理營造業實施規定及連江縣營造業管理暫行規定，領有之登記證書，已失法令依據，故須因應此項法規之變更而設。上開規定為實施營造業之分級管理，謀全國營造業之一致性所必要，且就原登記證書准依營造業管理規則第七條至第九條規定換領登記證書，並設有過渡期間，以為緩衝，已兼顧信賴利益之保護，並係就福建省金門、連江縣之營造業一律適用，尚未違反建築法第十五條第二項之意旨，於憲法第七條、第二十三條及有關人民權利保障之規定，亦無違背。惟營造業之分級條件及其得承攬工程之限額等相關事項，涉及人民營業自由之重大限制，為促進營造業之健全發展並貫徹憲法關於人民權

levels of the construction industry and assuring the quality of the construction projects. In addition, Article 45-1, an amendment thereto, provides, "Any construction business in Kinmen County or Lianjiang County of Fukien Province that has been registered under the Implementing Rules for the Supervision of Construction Business issued by the Kinmen War Zone Executive Committee or the Provisional Rules for the Supervision of the Construction Business issued by Lianjiang County shall, within three years as of the date of amendment to and implementation of the Regulation, i.e., June 1, 1993, have its old registration certificate replaced with a new one pursuant to Articles 7 through 9 of the Regulation; failure to so replace the relevant certificate will result in either reduction of the grade consistent with the criteria set forth in the Regulation or the cancellation of the registration certificate." Such amendment is introduced to cope with the fact that the original registration certificate received by any construction business pursuant to the Implementing Rules for the Supervision of the Construction Business issued by the

利之保障，仍應由法律或依法律明確授權之法規命令規定為妥。

Kinmen War Zone Executive Committee or the Provisional Rules for the Supervision of the Construction Business issued by Lianjiang County is no longer legally valid upon the termination of the special governance in the war zones of Kinmen County and Lianjiang County of Fukien Province on November 7, 1992. The aforesaid provision is essential to implement the graded supervision of the construction business and to achieve uniformity in supervision of the construction business. In view of the circumstances that the replacement of such certificate may be done pursuant to Articles 7 to 9 and that a transitional period is granted to the construction business for the accomplishment of the process, the protection of the legitimate reliance is not violated. Furthermore, in light of the universal application of such provision to all the construction business in Kinmen County and Lianjiang County of Fukien Province, it is not in violation of the purpose of Article 15, Paragraph 2, of the Construction Act, nor is it in contradiction to the relevant provisions of Articles 7 and 23 of the Constitution with respect to the protection of the

rights of the people. Nevertheless, in order to promote the sound development of the construction industry and to ensure the protection of the people's rights under the Constitution, it is proper that the conditions of grading for the construction business and the restrictions on the scale and value of the construction projects to be undertaken by such business and other relevant matters should still be prescribed by law or any rule or regulation expressly enabled by law since they involve significant restrictions on the freedom of the people to run business.

REASONING: It is provided in Article 15-II of the Construction Act that "the regulations governing the supervision of the construction business shall be prescribed by the Ministry of the Interior," thus generally delegating the power to the Ministry of the Interior to prescribe the regulations governing the supervision of the construction business. Such clause of delegation, though failing to specify the contents and scope of such delegation, can nevertheless enable one to infer from the construction of the law as a whole that the

解釋理由書：建築法第十五條第二項規定：「營造業之管理規則，由內政部定之」，概括授權訂定營造業管理規則。此項授權條款雖未就授權之內容與範圍為規定，惟依法律整體解釋，應可推知立法者有意授權主管機關，就營造業登記之要件、營造業及其從業人員準則、主管機關之考核管理等事項，依其行政專業之考量，訂定法規命令，以資規範（本院釋字第三九四號解釋參照）。內政部於八十二年六月一日修正公布之營造業管理規則第七條至第九條、第十六條對於申請登記之營造業，

lawmakers have intended to authorize the authority-in-charge, based on its administrative and professional considerations, to set forth such rules and regulations governing the construction business as the requirements for the registration of such business, the guidelines for the construction business and personnel employed by such business, the matters subject to evaluation and supervision by the authority-in-charge and so on. (Reference may be made to J. Y. Interpretation No. 394). Under Articles 7, 8 and 9 of the Regulation on the Supervision of the Construction Business, as amended and promulgated by the Ministry of the Interior on June 1, 1993, a registration certificate in the form of either Grade A, Grade B or Grade C shall be issued to a construction business filing for registration, based on such conditions of the individual business as the size of its capital, the number of qualified engineers employed by the business, and the amount of previous revenues generated by the same, etc., and, based on the grade specified in such certificate, the construction business is allowed to undertake construction projects subject to the

依資本額之大小、專業工程人員之員額，以及工程實績多寡等條件，核發甲、乙、丙三等級之登記證書，並按登記等級分別限制其得承攬工程之限額，係對人民營業自由之限制，然因營造業需具專門技術與工作機具，直接影響人民生命、身體與財產之安全，主管機關乃依建築法第十五條第二項規定之授權，本其行政專業之考量，就營造業之分級登記及其考核管理等事項而為規定，以提高營造業技術水準，確保營繕工程之專業技能及施工品質，尚符憲法第二十三條規定之意旨，與憲法有關人民權利應予保障之規定，亦無違背。

restrictions on the scale and value of such projects (refer to Article 16 of the said Regulation), which results in restrictions on the freedom of the people to run business. However, this is in light of the fact that the operation of the construction industry requires the kind of professional technologies as well as the tools and equipment that will have a direct impact on the safety of the people and their properties. Thus, enabled by Article 15-II of the Construction Act, the authority-in-charge has, based on its administrative and professional considerations, set forth such rules and regulations governing the construction business as the grading and registration of such business and the matters subject to evaluation and supervision by the authority-in-charge and so on to improve the technological levels of the construction industry and assure the quality of the construction projects. It is in line with the purpose of Article 23 of the Constitution and not contradictory to the requirements of the Constitution with respect to the protection of the rights of the people.

The implementation of any administrative law or regulation requires that the authority that enacted or issued such law or regulation, in making any amendment thereto or repealing the same pursuant to statutory procedure, also give consideration to the protection of the legitimate reliance of the party subject to such law or regulation. Except under the circumstances that an expiration date of any law or regulation is prescribed in advance or that any law or regulation ceases to apply due to change of circumstances, where the issue of legitimate reliance does not exist, the repeal of or amendment to any law or regulation necessitated by public interests that may have injured the objectively shown interests of the people under any substantive law arising out of legitimate reliance will nonetheless be consistent with the constitutional intent to protect the rights of the people if reasonable remedial measures have been taken or a clause of transitional period has been provided. (Reference may be made to J. Y. Interpretation No. 525). The Kinmen War Zone Executive Committee, considering the needs for the governance of the war

行政法規公布施行後，制定或發布法規之機關依法定程序予以修改或廢止時，應兼顧規範對象信賴利益之保護。除法規預先定有施行期間或因情事變遷而停止適用，不生信賴保護問題外，其因公益之必要廢止法規或修改內容致人民客觀上具體表現其因信賴而生之實體法上利益受損害，如已採取合理之補救措施，或訂定過渡期間之條款，即屬符合憲法保障人民權利之意旨（本院釋字第五二五號解釋參照）。金門戰地政務委員會為符合戰地政務需要，原於福建省金門縣、連江縣頒布管理營造業實施規定及連江縣營造業管理暫行規定，就該地區營造業之分級登記與管理等事項作特別之處理。惟該地區戰地政務於八十一年十一月七日解除後，營造業依上述規定領取之登記證書即失法令依據，為因應此項變更，主管機關乃於八十二年六月一日增訂營造業管理規則第四十五條之一明定：「福建省金門縣、連江縣依金門戰地政務委員會管理營造業實施規定、連江縣營造業管理暫行規定登記之營造業，應於中華民國八十二年六月一日本規則修正施行日起三年內，依同日修正施行之第七條至第九條之規定辦理換領登記證書，逾期未辦理換領者，按其與本規則相符之等級予

zones, previously issued the Implementing Rules for the Supervision of the Construction Business and Provisional Rules for the Supervision of the Construction Business in Lianjiang County, which applied respectively to Kinmen County and Lianjiang County, to provide for special treatment of the grading and registration and supervision of the construction business located in such areas. However, the original registration certificate received by any construction business pursuant to the aforesaid rules is no longer legally valid upon the termination of the special governance in the war zones of Kinmen County and Lianjiang County of Fukien Province on November 7, 1992. As a result, the authority-in-charge introduced on June 1, 1993, an amendment to the Regulation on the Supervision of the Construction Business, i.e., Article 45-1, which provides, "Any construction business in Kinmen County or Lianjiang County of Fukien Province that has been registered under the Implementing Rules for the Supervision of the Construction Business issued by the Kinmen War Zone Executive Committee or the Provisional Rules

以降等或撤銷其登記證書。」於福建省金門、連江縣之營造業一律適用，嗣後就其管理考核與全國各地區之營造業，受現行相同法令之規範，為實施營造業分級管理，以增進公共利益，並謀全國營造業法令適用之一致性所必要。又該項規定不僅設有適用營造業管理規則之過渡期間，以為緩衝，並准予依該管理規則規定換領登記證書之方式辦理，所定過渡期間復無恣意裁量或顯非合理之情形，已兼顧此等營造業信賴利益之保護。上開第四十五條之一之規定尚未違反建築法第十五條第二項之授權意旨，於憲法第七條、第二十三條及有關人民權利保障之規定，亦無牴觸。

for the Supervision of the Construction Business issued by Lianjiang County shall, within three years as of the date of amendment to and implementation of the Regulation, i.e., June 1, 1993, have its old registration certificate replaced with a new one pursuant to Articles 7 through 9 of the Regulation; failure to so replace the relevant certificate will result in either reduction of the grade consistent with the criteria set forth in the Regulation or the cancellation of the registration certificate." Thus, all the construction business in Kinmen County and Lianjiang are subject to the same rule without exception and they are subject to the same existing laws and regulations as the construction business anywhere else in this country in terms of their supervision and evaluation, which is essential to carry out the graded supervision of the construction business to promote public interests and to achieve uniformity in the application of laws and regulations to the construction business nationwide. In view of the circumstances that a transitional period is provided for the application of the Regulation on the Supervision of the Construction Business

and that the replacement of a registration certificate may be done pursuant to relevant provisions thereof, and, further, that the length of such transitional period is not arbitrarily determined or obviously unreasonable, the protection of the legitimate reliance by such construction business is therefore not violated. The aforesaid provision of Article 45-1, therefore, is not in violation of the purpose of Article 15-II of the Construction Act, nor is it in contradiction to the relevant provisions of Articles 7 and 23 of the Constitution with respect to the protection of the rights of the people.

Nevertheless, in order to promote the sound development of the construction industry and to ensure the protection of the people's rights under the Constitution, it is proper that the conditions of grading for the construction business and the restrictions on the scale and value of the construction projects to be undertaken by such business, as well as such other relevant matters as the conditions of grading for the construction business, the placement of professional personnel, the estab-

惟營造業之分級條件及其得承攬工程之限額等，涉及人民營業自由之重大限制，諸如營造業之分級條件、專業人員之設置、公會之設立及營造業之分級條件或其他改進等重要事項如何由有學識經驗之專家、營造業人士參與諮詢等，為促進營造業之健全發展並貫徹憲法關於人民權利之保障，仍應由法律或依法律明確授權之法規命令規定為妥。

lishment of the association or other important matters regarding improvements that may require consultation with experienced experts and participation of people engaged in the construction business, should still be prescribed by law or any rule or regulation expressly enabled by law since they involve significant restrictions on the freedom of the people to run business.

Justice Tsay-Chuan Hsieh filed concurring opinion.

本號解釋謝大法官在全提出協同意見書。

J. Y. Interpretation No.539（February 8, 2002）*

ISSUE: (1) Shall the constitutional protection of judgeship be extended to the holder of office as a division's leading judge of the high and district courts?

(2) Shall a judge's removal from, transfer from, or promotion to the holder of office as a division's leading judge and the term thereof be subject to the principle of legal reservation（*Gesetzesvorbehalt*） and thus only be carried out with the authorization of the laws?

RELEVANT LAWS:

Articles 77, 80, 81 and 82 of the Constitution（憲法第七十七條、八十條、第八十一條、第八十二條）; J.Y. Interpretation No. 530（司法院釋字第五三〇號解釋）; Articles 15, 16, 34, Paragraphs 1 and 2, 36, 51 and 78 of the Court Organic Act（法院組織法第十五條、第十六條、第三十四條第一項、第二項、第三十六條、第五十一條、第七十八條）; Articles 4, 9, 10, Paragraph 2, 14 and 30 of the Organic Act of the Administrative Courts（行政法院組織法第四條、第九條、第十條第二項、第十四條、第三十條）; Articles 1 and 4 of the Act Governing the Promotion of Public Functionaries（公務人員陞遷法第一條、第四條）; Article 2 of the Enforcement Rules of the Act Governing the Promotion of Public

* Translated by Joe Y. C. Wu.

** Contents within frame, not part of the original text, are added for reference purpose only.

Functionaries（公務人員陞遷法施行細則第二條）; Points 2 and 3 of the Guidelines for Administering the Term and Transfer of Division's Leading Judges of the High Court and Any Inferior Courts and their Branches（高等法院以下各級法院及其分院法官兼庭長職期調任實施要點第二點、第三點）.

KEYWORDS:

presiding judge（審判長）, divisions leading judge（庭長）, chief judge（一、二審院長）, judgeship（法官身分）, removal（免職）, election（遴選）, doctrine of adjudicative neutrality（審判獨立）, judicial autonomy（司法自主）, doctrine of legal reservation（法律保留原則）, court ministerial business（司法行政事務）, judicial conduct（審判事務）, non-partisan（超出黨派）.**

HOLDING: Article 80 of the Constitution provides: "Judges must remain non-partisan and neutrally adjudicate a case according to the laws, free from any influence." This provision announces judicial autonomy and calls for the state to set up a well-functioning judicial system embodied with the doctrine of adjudicative neutrality. Article 81 of the Constitution further provides: "Judges shall hold office for life. Unless criminally convicted, sanctioned, or adjudged inca-

解釋文：憲法第八十條規定：「法官須超出黨派以外，依據法律獨立審判，不受任何干涉。」除揭示司法權獨立之原則外，並有要求國家建立完備之維護審判獨立制度保障之作用。又憲法第八十一條明定：「法官為終身職，非受刑事或懲戒處分或禁治產之宣告，不得免職，非依法律，不得停職、轉任或減俸。」旨在藉法官之身分保障，以維護審判獨立。凡足以影響因法官身分及其所應享有權利或法律上利益之人事行政行為，固須依據法律始得為之，惟

pacitated, judges cannot be removed from office; unless pursuant to the laws, judges can neither be suspended nor transferred from office nor receive reduced compensation for their services." This constitutional protection is meant to provide an assurance of adjudicative neutrality through judgeship protection. Therefore, any personnel changes or administrative adjustments affecting a judge's office, rights or legal entitlements can only be implemented when the laws so provide. Moreover, the protection is not limited to those enumerated under the Constitution. Even so, any such changes or adjustments not affecting a judge's office or any legal entitlements may be reasonably carried out in light of judicial administrative supervisory power, provided that the doctrine of adjudicative neutrality is not violated.

不以憲法明定者為限。若未涉及法官身分及其應有權益之人事行政行為，於不違反審判獨立原則範圍內，尚非不得以司法行政監督權而為合理之措置。

Pursuant to relevant articles of the Court Organic Act and the Organic Act of the Administrative Courts, the office of the division's leading judge of each judicial level shall be assumed by a judge of that level except for the one assumed by a

依法院組織法及行政法院組織法有關之規定，各級法院所設之庭長，除由兼任院長之法官兼任者外，餘由各該審級法官兼任。法院組織法第十五條、第十六條等規定庭長監督各該庭（處）之事務，係指為審判之順利進行所必要

dean of the court. Articles 15 and 16 of the Court Organic Act provide that division's leading judges shall have the responsibility of supervising judicial administration affairs within their ambit. Such ministerial business is of a nature of ancillary judiciary administration necessary for the orderly proceedings of a trial. A division's leading judge may also act as a presiding judge and form a trial panel with other judges to try a case. The office of a presiding judge is empowered to command trial proceedings. A presiding judge has the same judicial power in determining a case as the other panel judges except that the presiding judge is the commander of the trial. While a division's leading judge as a rule acts as a presiding judge during a trial en banc, a most senior judge may instead so perform in the absence of a division's leading judge. In terms of a trier of facts and law, both are judges in essence. A presiding judge is a commander of proceedings during a trial en banc. In comparison, the office of division's leading judge is of a ministerial nature. It is evident that the division's leading judge and presiding judge hold

之輔助性司法行政事務而言。庭長於合議審判時雖得充任審判長，但無庭長或庭長有事故時，以庭員中資深者充任之。充任審判長之法官與充當庭員之法官共同組成合議庭時，審判長除指揮訴訟外，於審判權之行使，及對案件之評決，其權限與庭員並無不同。審判長係合議審判時為統一指揮訴訟程序所設之機制，與庭長職務之屬於行政性質者有別，足見庭長與審判長乃不同功能之兩種職務。憲法第八十一條所保障之身分對象，應限於職司獨立審判之法官，而不及於監督司法行政事務之庭長。又兼任庭長之法官固比其他未兼行政職務之法官具有較多之職責，兼任庭長者之職等起敘雖亦較法官為高，然二者就法官本職所得晉敘之最高職等並無軒輊，其在法律上得享有之權利及利益皆無差異。

offices with different functions. The judgeship protection under Article 81 of the Constitution is afforded to judges so that they can adjudicate a case in neutrality and it does not extend to the office of a division's leading judge established to supervise the ministerial business of a court. Although a judge assuming the office of division's leading judge has more job responsibilities than other judges and enjoys a higher starting grade, the highest grade and step both abovementioned judges may advance to in terms of judgeship are the same, as are the rights or legal entitlements both may enjoy under the laws.

Pursuant to Points 2 and 3 of the Guidelines for Administering the Term and Transfer of Division's Leading Judges of the High Court and Any Inferior Courts and their Branches (amended as Points 2 and 4 of the Guidelines for Administering the Term and Transfer of Division's Leading Judges of the High Court, Any Inferior Courts and their Branches, and the High Administrative Court), issued by the Judicial Yuan in a letter of May 5, 1995, num-

司法院以中華民國八十四年五月五日（八四）院台人一字第〇八七八七號函訂定發布之「高等法院以下各級法院及其分院法官兼庭長職期調任實施要點」（八十九年七月二十八日（八九）院台人二字第一八三一九號函修正為「高等法院以下各級法院及其分院、高等行政法院法官兼庭長職期調任實施要點」），其中第二點或第三點規定於庭長之任期屆滿後，令免兼庭長之人事行政行為，僅免除庭長之行政兼職，於其

bered (84) Yuan-Tai-Ren-Yi-Tzi (08787), upon the expiry of a division's leading judge's term, an administrative act to remove a judge from the office of division's leading judge, without adversely affecting the judgeship, its rank, grade, or compensation, releases a judge from administrative duties only. Thus, such a removal is of a nature akin to an administrative adjustment of any government agency. A judiciary organization based on its inherent power of management shall have the power to issue orders making any administrative arrangements and the exercise of the power is not in contravention of the judgeship protection afforded under Article 81 of the Constitution.

擔任法官職司審判之本職無損，對其既有之官等、職等、俸給亦無不利之影響，故性質上僅屬機關行政業務之調整。司法行政機關就此本其組織法上之職權為必要裁量並發布命令，與憲法第八十一條法官身分保障之意旨尚無牴觸。

To realize the precept of fair trial, well-functioning trial peripheral ministerial measures are indispensable. Judiciary administration regarding trial proceedings is such a system. Division's leading judges play an active role in supervising and managing judicial administration affairs. To be consistent with the principle of legal reservation *(Gesetzesvorbehalt)* in organizing the courts as required by Arti-

健全之審判周邊制度，乃審判公平有效遂行之必要條件，有關審判事務之司法行政即為其中一環。庭長於各該庭行政事務之監督及處理，均有積極輔助之功能。為貫徹憲法第八十二條法院組織之法律保留原則，建立審判獨立之完備司法體制，有關庭長之遴選及任免等相關人事行政事項，仍以本於維護審判獨立之司法自主性（本院釋字第五三〇號解釋參照），作通盤規劃，以法律

cle 82 of the Constitution and to establish a well-functioning independent judicial system, it is essential that the ministerial business in connection with the election and removal of a division's leading judge be well planned through authorization of law for the purpose of maintaining judicial autonomy and upholding the doctrine of adjudicative neutrality (See J.Y. Interpretation No. 530).

規定為宜，併此指明。

REASONING: Article 80 of the Constitution provides: "Judges must remain non-partisan and neutrally adjudicate a case according to the laws, free from any influence." This provision means that judges must try a case based on their own knowledge of the laws, not subject to any directives or orders coming from within upper courts or judiciary government agencies or without, a principle called the doctrine of adjudicative neutrality. Based on this doctrine, the state may be called to set up a well-established judicial system. Article 81 of the Constitution further provides: "Judges shall hold office for life. Unless criminally convicted, sanctioned, or adjudged incapacitated,

解釋理由書：憲法第八十條規定：「法官須超出黨派以外，依據法律獨立審判，不受任何干涉。」係指法官應本諸自己之法律判斷為裁判，不僅不受任何外來指示、命令，亦不受司法行政機關或上級法院內部之指示與命令，此即審判獨立之原則。基於此一原則，並有要求國家建立完備制度保障之作用。又憲法第八十一條明定：「法官為終身職，非受刑事或懲戒處分或禁治產之宣告，不得免職，非依法律，不得停職，轉任或減俸。」旨在藉法官之身分保障，而維護審判獨立。凡足以影響因法官身分及其所應享有權利或法律上利益之人事行政行為，固須依據法律始得為之，且不以憲法上揭明定者為限，惟若未涉及法官身分及其應有權益之行

judges cannot be removed from office; unless pursuant to the laws, judges can neither be suspended nor transferred from office nor receive reduced compensation for their services." This constitutional protection is meant to provide an assurance of adjudicative neutrality through judgeship protection. Therefore, any personnel changes or administrative adjustments affecting a judge's office, rights or legal entitlements can only be carried out when the laws so provide. Moreover, the protection is not limited to those enumerated under the Constitution. Even so, any such changes or adjustments not affecting a judge's office or any legal entitlements may be reasonably done in light of judicial administrative supervisory power, provided that the doctrine of adjudicative neutrality is not violated.

為，於不違反審判獨立原則範圍內，尚非不得以司法行政監督權而為合理之措置。

Pursuant to Paragraph 1 of Article 15, Articles 16, 36, and 51 of the Court Organic Act, and Articles 4, 9, 14 of the Organic Act of the Administrative Courts, the office of division's leading judge of each adjudicative level shall be assumed by a judge of that level except for the one

依法院組織法第十五條第一項、第十六條、第三十六條、第五十一條及行政法院組織法第四條、第九條、第十四條等有關之規定，各級法院所設之庭長除由兼任院長之法官兼任者外，餘由各該審級法官兼任，是為庭長由法官兼任之依據。法院組織法及行政法院組織

assumed by a dean of the court. As the Acts provide, a judge may assume the office of a division's leading judge. Both Acts further delegate division's leading judges the power to supervise judicial administration affairs within their ambit. Such ministerial business is of a nature of ancillary judiciary administration necessary for the orderly proceedings of a trial. This view could be further evidenced by the power delegated to the Judicial Yuan to promulgate rules regulating court business of each level and district pursuant to Article 78 of the Court Organic Act and Article 30 of the Organic Act of the Administrative Courts. A division's leading judge is mainly responsible for supervising the ministerial business of the court. A division's leading judge may also act as a presiding judge and form a panel with other judges to try a case. The office of a presiding judge then is empowered to command trial proceedings. A presiding judge has the same judicial power in determining a case as the other panel judges except that the presiding judge is the commander of the trial. While a division's leading judge as a rule acts as the presid-

法規定之庭長監督各該庭（處）事務，係指為審判之順利進行所必要之輔助性司法行政事務而言，此有法院組織法第七十八條、行政法院組織法第三十條授權司法院訂定各級法院及分院處務規程可資參照。庭長之職務主要係監督各該庭行政事務，於審判事務雖充任合議庭審判長，但無庭長或庭長有事故時，仍以庭員中資深者充任之。擔任司法行政事務之庭長與充當庭員之法官共同組成合議庭時，充任審判長乃為統一指揮訴訟程序所設之機制，庭長充任之審判長除指揮訴訟外，於審判權之行使，及對案件之評決，其權限與庭員相同。是二者僅有職務之分工，就發現真實，作成裁判而言，均係秉持法官之本職為之。原兼庭長之法官，一旦免兼庭長，其因而充任審判長職務亦隨之更動，惟其法官身分及所應享之權益並無損害。依法院組織法第三十四條第一項、第三十六條、行政法院組織法第九條、第十條之規定，兼任庭長者其職等起敘雖較法官為高，亦比其他法官具有較多之職責，但依法院組織法第三十四條第二項、行政法院組織法第十條第二項之規定，二者就法官本職所得晉敘之最高職等並無不同，因任職者年資深淺有別，法官職等未必較庭長為低，其在法律上得享有

ing judge during a trial en banc, a most senior judge may instead so perform in the absence of a division's leading judge. In comparison, both differ in duty division. In terms of a trier of facts and law, both are judges in essence. A judge once removed from the office of division's leading judge should automatically be removed from the office of presiding judge. Even so, the judgeship and its legal entitlements are not adversely affected. According to Paragraph 1 of Article 34 and Article 36 of the Court Organic Act and Articles 9 and 10 of the Organic Act of the Administrative Courts, the starting grade for a division's leading judge is higher than that of a judge since a division's leading judge has more responsibilities. However, according to Paragraph 2 of Article 34 of the Court Organic Act and Paragraph 2 of Article 10 of the Organic Act of the Administrative Courts, the highest grade and step both may advance in terms of judgeship are the same, as are the rights or legal entitlements both may enjoy under the laws. Furthermore, due to seniority, a judge may have a higher grade or step than a division's

之權利及利益亦皆無差異。是以法官免兼庭長既非所謂降調，法官派兼庭長亦非公務人員陞遷法第四條及同法施行細則第二條所稱陞任職等較高之職務，更非行政機關之非主管職務陞任主管職務可比，況有關法官之任用、遷調，法院組織法、行政法院組織法及司法人員人事條例另有規定，並無公務人員陞遷法之適用（參照該法第一條）。綜上所述，庭長與審判長係屬不同功能之兩種職務，從而憲法第八十一條所保障身分之對象，應限於職司獨立審判之法官，而不及於監督司法行政事務之庭長。

leading judge. Therefore, as a judge's removal from the office of division's leading judge does not constitute a demotion, so a judge's assumption of that office is not such a promotion to a position of a higher grade as provided under Article 4 of the Act Governing the Promotion of Public Functionaries and Article 2 of the Enforcement Rules of the same Act, much less a promotion from a non-chief position to a chief one. Furthermore, a judge's appointment and transfer are exclusively subject to the purview of the Court Organic Act, Organic Act of the Administrative Courts, and Judiciary Staff Personnel Act when the Act Governing the Promotion of Public Functionaries is inapplicable (See Article 1 of the Act Governing the Promotion of Public Functionaries). Since the offices of division's leading judge and presiding judge are different in terms of their job responsibilities, the protection under Article 81 of the Constitution is afforded to judges so that they can adjudicate a case in neutrality and it does not extend to the office of a division's leading judge established to supervise the ministerial business of a court.

Pursuant to Points 2 and 3 of the Guidelines for Administering the Term and Transfer of Division's Leading Judges of the High Court and Any Inferior Courts and their Branches (amended as Points 2 and 4 of the Guidelines for Administering the Term and Transfer of Division's Leading Judges of the High Court, Any Inferior Courts and their Branches, and the High Administrative Court), issued by the Judicial Yuan in a letter of May 5, 1995, numbered (84) Yuan-Tai-Ren-Yi-Tzi (08787), upon the expiry of a leading judge's term, unless the term is extended on a need basis, an administrative act to remove a judge from the office of leading judge, without adversely affecting the judgeship, its rank, grade, or compensation, releases a judge from administrative duties only. Thus, such a removal is of a nature akin to an administrative adjustment of any government agency. A judiciary organization based on its inherent power of management shall have the power to issue orders making any administrative arrangements and the exercise of the power is not in contravention of the judgeship protection afforded under Article 81 of the Constitu-

司法院以八十四年五月五日（八四）院台人一字第〇八七八七號函訂定發布之「高等法院以下各級法院及其分院法官兼庭長職期調任實施要點」第二點或第三點（現修正為「高等法院以下各級法院及其分院、高等行政法院法官兼庭長職期調任實施要點」第二點、第四點）規定，於庭長之任期屆滿後，未因業務需要酌予延長職期，令免兼庭長之人事行政行為，僅免除庭長之行政兼職，於其擔任法官職司審判之本職無損，對其既有之官等、職等、俸給亦無不利之影響，故性質上僅屬機關行政業務之調整。司法行政機關就此本其組織法上之職權為必要裁量並發布命令，與憲法第八十一條法官身分保障之意旨尚無牴觸。

tion.

To realize the precept of fair trial, well-functioning trial peripheral ministerial measures are indispensable. Judiciary administration regarding trial proceedings is such a system. The leading judge of a civil or criminal court or a civil judgment enforcement bureau supervises each court's ministerial business, and the leading judge of a specialized, general or summary court manages each court's overall ministerial business. The leading judges play an active role in facilitating civil, criminal and judgment enforcement proceedings. The leading judges of administrative courts play an identical role. When a judge is elected to the office of leading judge through appropriate processes based on erudition, competence, and comprehensive trial experience, he/she certainly contributes to the upgrading of trial quality. Article 82 of the Constitution provides: "The organization of the Judicial Yuan and every level of the courts shall be established pursuant to the laws." To be consistent with the principle of legal reservation (*Gesetzesvorbehalt*) in orga-

健全之審判周邊制度，乃審判公平有效遂行之必要條件，有關審判事務之司法行政即為其中一環。庭長於民、刑事庭、民事執行處監督各庭、處行政事務，於專業法庭及普通庭、簡易庭則綜理全庭行政事務，於民、刑事審判、民事執行與其他各類案件之處理，均有積極輔助之功能。於行政法院之庭長亦同。庭長若經由適當程序遴選學養才能俱優，審判經驗豐富之法官兼任，當有助於審判品質之提昇。憲法第八十二條規定：「司法院及各級法院之組織以法律定之。」為貫徹法院組織之法律保留原則，建立審判獨立之完備司法體制，有關庭長之遴選及任免等相關人事行政事項，仍以本諸維護審判獨立之司法自主性（本院釋字第五三〇號解釋參照），作通盤規劃，以法律規定為宜，併此指明。

nizing the courts and to establish a well-functioning judicial system with adjudicative neutrality, it is essential that the ministerial business in connection with the election and removal of a leading judge be well planned through authorization of law for the purpose of maintaining judicial autonomy and upholding the doctrine of adjudicative neutrality (See J.Y. Interpretation No. 530).

Justice Sen-Yen Sun filed concurring opinion.

本號解釋孫大法官森焱提出協同意見書。

J. Y. Interpretation No.540（March 15, 2002）*

ISSUE: When those who file applications with the authority to purchase or lease public-housing units or to obtain a loan to purchase public-housing units enter into agreements and establish contractual relationships with the authority, how shall the agreements be classified under the law? And, where it is clearly categorized by the law as a matter of public law nature, should ordinary courts dismiss the case on the ground that it has no jurisdiction over the case and there are new administrative litigations available?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）; J. Y. Interpretation Nos.115, 466 and 524（司法院釋字第一一五號、第四六六號、第五二四號解釋）; Articles 2 and 178 of the Administrative Proceedings Act（行政訴訟法第二條、第一百七十八條）; Article 101 of the Public Officials Election and Recall Act（公職人員選舉罷免法第一百零一條）; Articles subsequent to Article 55 of the Social Order Maintenance Act（社會秩序維護法第五十五條以下）; Articles 1, 2, 6, 14, 16, 21, Paragraph 1, and 23, 30 of the Public Housing Act（國民住宅條例第一條、第二條、第六條、第十四條、第十六條、第二十一條第一項、第二十三條、第三十條）;

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* Translated by Wei-Feng Huang of THY Taiwan International Law Offices.

** Contents within frame, not part of the original text, are added for reference purpose only.

Articles 88 and 89 of the Act Governing the Punishment for Violation of Road Traffic Regulations（道路交通管理處罰條例第八十八條、第八十九條）; Article 5 of the National Health Insurance Act（全民健康保險法第五條）; Article 4 of the Measures Governing the Sale and Lease of Public Housing and the Tender for Sale and Lease of Commercial Services Facilities and Other Buildings（國民住宅出售、出租及商業服務設施暨其他建築物標售標租辦法第四條）.

KEYWORDS:

administrative court（行政法院）, ordinary court（普通法院）, legislative body（立法機關）, nature of case（事件之性質）, jurisdiction（審判權）, adjudicative body（審判機關）, public housing（國民住宅）, exercise of public authority（公權力之行使）, compulsory enforcement（強制執行）, a new system of administrative proceeding（行政訴訟新制）, people's right to institute legal proceeding（訴訟權）.**

HOLDING: To attain administrative objectives, the State may elect to engage in acts either under public or private law as a means of its execution. Where a dispute arises from the said act, such dispute of a public-law nature shall be adjudicated by administrative courts, while a dispute of a private-law nature

解釋文：國家為達成行政上之任務，得選擇以公法上行為或私法上行為作為實施之手段。其因各該行為所生爭執之審理，屬於公法性質者歸行政法院，私法性質者歸普通法院。惟立法機關亦得依職權衡酌事件之性質、既有訴訟制度之功能及公益之考量，就審判權歸屬或解決紛爭程序另為適當之設計。

shall be adjudicated by ordinary courts. However, the legislative body may, pursuant to its authority and taking into consideration the nature of cases, the function of the currently existing litigation system and the public interests, appropriately design the allotment of jurisdiction or procedures for dispute resolutions. Where the said design is enacted as a law, the law shall be binding upon all the institutions and the people within the State; and all levels of the adjudicative body shall be obligated to follow it as well.

此種情形一經定為法律，即有拘束全國機關及人民之效力，各級審判機關自亦有遵循之義務。

To provide housing for lower-income families, the Public Housing Act, enacted on July 30, 1982, authorizes the competent authority to construct public-housing units for sale or for lease, to provide loans to the said families for their self-construction or to encourage private investors to build public-housing units. With the exception of public-housing units constructed by private investors, where the competent authority has approved the sale or lease of or loans for home construction and the said authority has, on behalf of the State or local government bodies, entered

中華民國七十一年七月三十日制定公布之國民住宅條例，對興建國民住宅解決收入較低家庭居住問題，採取由政府主管機關興建住宅以上述家庭為對象，辦理出售、出租、貸款自建或獎勵民間投資興建等方式為之。其中除民間投資興建者外，凡經主管機關核准出售、出租或貸款自建，並已由該機關代表國家或地方自治團體與承購人、承租人或貸款人分別訂立買賣、租賃或借貸契約者，此等契約即非行使公權力而生之公法上法律關係。上開條例第二十一條第一項規定：國民住宅出售後有該條所列之違法情事者，「國民住宅主管機

into sales, lease or loan agreements with buyers, tenants or borrowers accordingly, the legal relationships between the parties to such agreements do not result from the exercise of public authority under the public law and as a result, they are not public contracts. Article 21, Paragraph 1, of the said Act stipulates that where a violation of this Article occurs after the sale of a public-housing unit, "the competent public housing authority may retrieve such housing unit and the land on which the unit was built and may apply to the court for a judgment of compulsory enforcement." It makes the Article a special provision that grants enforcement power to regulate specific violations of the said agreements. Such cases concerning the legal relationship between private rights shall be categorized as civil ones and the courts referred to in this Article shall be ordinary courts. Consequently, ordinary courts having jurisdiction over such similar cases shall not dismiss the petitions by making a decision rejecting a compulsory enforcement by reason that a new system of administrative litigations has commenced and there are administrative

關得收回該住宅及基地，並得移送法院裁定後強制執行」，乃針對特定違約行為之效果賦予執行力之特別規定，此等涉及私權法律關係之事件為民事事件，該條所稱之法院係指普通法院而言。對此類事件，有管轄權之普通法院民事庭不得以行政訴訟新制實施，另有行政法院可資受理為理由，而裁定駁回強制執行之聲請。

courts to govern the petitions.

Where a case is determined by virtue of this Yuan's interpretation as a civil matter and this Yuan opines that the administrative court filing the petition for interpretation has no jurisdiction over the case, such administrative court shall dismiss the case by a decision and then, pursuant to its authority, transfer the case to an ordinary court having jurisdiction over the case. Further, the court to which the case being transferred shall, according to the meaning of this Interpretation, bring the case to trial in accordance with the law to protect the people's right of instituting legal proceedings vested by the Constitution.

事件經本院解釋係民事事件，認提起聲請之行政法院無審判權者，該法院除裁定駁回外，並依職權移送有審判權限之普通法院，受移送之法院應依本院解釋對審判權認定之意旨，回復事件之繫屬，依法審判，俾保障人民憲法上之訴訟權。

REASONING: To attain administrative objectives, the State may elect to engage in acts either under public or private law as a means of its execution. Where a dispute arises from the said act, such dispute of a public-law nature shall be adjudicated by administrative courts, while a dispute of a private-law nature shall be adjudicated by ordinary courts.

解釋理由書：國家為達成行政上之任務，得選擇以公法上行為或私法上行為作為實施之手段。其因各該行為所生爭執之審理，屬於公法性質者歸行政法院，私法性質者歸普通法院。惟立法機關亦得依職權衡酌事件之性質、既有訴訟制度之功能及公益之考量，就審判權歸屬或解決紛爭程序另為適當之設計。此種情形一經定為法律，縱事件屬

However, the legislative body may, pursuant to its authority and taking into consideration the nature of cases, the function of the currently existing litigation system and the public interests, appropriately design the allotment of jurisdiction or procedures for dispute resolutions. Where the said design is enacted as a law, even though the nature of the case may be debatable academically, the law's binding effect upon all the institutions and the people within the State shall not be affected and all levels of the adjudicative body shall be obligated to follow it. This Yuan's Interpretation No.466 also presents the same intent as the abovementioned.

性在學理上容有推求餘地，其拘束全國機關及人民之效力，並不受影響，各級審判機關自亦有遵循之義務，本院釋字第四六六號解釋亦同此意旨。

The Public Housing Act, enacted for the purposes of overall administration of the construction and management of public housing, securing the people's livelihood and improving the society's welfare (Article 1 of the Act), stipulates that the government agency shall acquire land to build and allot housing units to provide housing for lower-income families (Articles 2 and 6 of the Act). The Act's con-

國民住宅條例係為統籌興建及管理國民住宅，以安定國民生活及增進社會福祉之目的而制定（該條例第一條），並由政府機關取得土地興建及分配住宅，以解決收入較低家庭之居住問題（同條例第二條、第六條），其具體之方法係由政府主管機關取得土地、籌措資金並興建住宅，以收入較低家庭為對象辦理出售、出租、貸款自行建築或獎勵民間投資興建（同條例第二條、第

crete provisions allow the authority to acquire land, raise funds and build housing units for lower-income families, to administer the sale and lease of such units, to provide loans for their self-construction or to encourage private investors to build public-housing units (See Articles 2, 6, 14, 16, 23 and 30 of the Act). As for public-housing units constructed by private investors under incentive programs, there is no doubt that the legal relationships between those who purchased the public-housing units and those who built such units are purely private ones. With respect to the authority's direct construction and allotment of public-housing units, when those who have a need to purchase or lease a public-housing unit or to obtain a loan to buy their public housing unit, firstly they have to file an application with the authority. Upon approving their application, the authority will enter into a sale, lease, or loan agreement with such an applicant under private law. These agreements are executed for the administrative purposes of promoting social welfare and providing for lower-income people and are private economic measures having no

六條、第十四條、第十六條、第二十三條及第三十條等參照）。除其中獎勵民間投資興建之國民住宅，承購人與住宅興建業者屬於單純之私法關係，並無疑義外，主管機關直接興建及分配之住宅，先由有承購、承租或貸款需求者，向主管機關提出申請，經主管機關認定其申請合於法定要件，再由主管機關與申請人訂立私法上之買賣、租賃或借貸契約。此等契約係為推行社會福利並照顧收入較低國民生活之行政目的，所採之私經濟措施，並無若何之權力服從關係。性質上相當於各級政府之主管機關代表國家或地方自治團體與人民發生私法上各該法律關係，尚難逕謂政府機關直接興建國民住宅並參與分配及管理，即為公權力之行使。至於申請承購、承租或貸款者，經主管機關認為依相關法規或行使裁量權之結果（參照國民住宅出售、出租及商業服務設施暨其他建築物標售標租辦法第四條）不符合該當要件，而未能進入訂約程序之情形，既未成立任何私法關係，此等申請人如有不服，須依法提起行政爭訟，係另一問題。

authority/subservience relationship thereto. By their nature, these agreements are equivalent to the private legal relationships between various levels of the competent authority, on behalf of the State or local government bodies, and the people. Therefore, the direct construction, allotment and management of public housing by the government authority shall not be regarded as the exercise of public authority. As for those applications filed with the authority to purchase, lease or obtain a loan, should the authority determine the said applicants to be ineligible, resulting from the authority's scrutiny in accordance with relevant regulations or its discretion (See Article 4 of the Measures Governing the Sale and Lease of Public Housing and the Tender for Sale and Lease of Commercial Services Facilities and Other Buildings), those ineligible applicants shall not be able to enter into a contractual relationship with the authority. Since no private legal relationship has been established between the authority and the ineligible applicants, it is another issue if the ineligible applicants do not agree with the authority's determination.

In such case, they have to institute administrative litigations under the law.

Before the new system set forth in the Administrative Proceedings Act became effective on July 1, 2000, due to the lack of appropriate administrative litigations and alternative litigation proceedings in the then existing law, some cases of a public-law nature had been long resolved pursuant to the Code of Civil Procedure. For example, cases concerning insurance compensation to government employees (See J.Y. Interpretation No. 466) and disputes arising from and between the insured and the insurance healthcare providers, provided for in Article 5 of the National Health Insurance Act, prior to the promulgation of Interpretation No. 524, are both applicable to the abovementioned application. Since the new administrative litigations have been put into effect, similar cases of the same nature shall not be adjudicated by civil courts. However, where a case of a public-law nature is clearly categorized as belonging to a jurisdiction other than the administrative one by law, the case is not necessarily

在八十九年七月一日行政訴訟法新制實施前，若干性質上屬於公法之事件，因行政訴訟欠缺適當之訴訟種類，而法律又未就其另行設計其他訴訟救濟途徑，遂長期以來均循民事訴訟解決，例如公務人員保險給付事件（參照本院釋字第四六六號解釋）、釋字第五二四號解釋公布前之全民健康保險法第五條被保險人與保險醫事服務機構間之爭議事件等，均其適例，此類事件嗣後自無再由民事法院審理之理由。若雖具公法性質，但法律已明確規定其歸屬於其他審判權時，不因行政訴訟改制擴張訴訟種類，而成為行政法院管轄之公法事件，例如選舉無效事件、當選無效事件（公職人員選舉罷免法第一百零一條）、交通違規事件（道路交通管理處罰條例第八十八條、第八十九條）、行政罰事件（社會秩序維護法第五十五條以下）等，除仍分別由民事法院及刑事法院審判外，其審級及救濟程序與通常民、刑事案件，亦不盡相同。此類事件即行政訴訟法第二條所稱公法事件法律別有規定，而不屬於行政法院審判之情形。如前所述，本件國民住宅之買賣既

subject to the administrative courts' jurisdiction just because of the expansion of administrative litigation categories and the new amendment to administrative litigations. For instance, incidents concerning a void election or the elected declaration void (See Article 101 of the Public Officials Election and Recall Act), incidents concerning traffic violation (Articles 88 and 89 of the Act Governing the Punishment for Violation of Road Traffic Regulations) and incidents concerning administrative penalties (Articles subsequent to Article 55 of the Social Order Maintenance Act) are to be adjudicated by civil courts and criminal courts, respectively. Furthermore, the appeal systems and remedy procedures for the abovementioned incidents are not quite the same as those of the ordinary civil or criminal cases. Those types of incidents fall within the category stipulated in Article 2 of the Administrative Proceedings Act "where the law provides a specific category to a public-law case and does not allow the case to be adjudicated by administrative courts." In line with the above, since the underlying case concerning the purchase

屬私法關係，國民住宅之所有人或居住人有國民住宅條例第二十一條第一項所列各款：「一、作非法使用者。二、積欠貸款本息三個月，經催告仍不清償者。三、出售、出典、贈與或交換未經國民住宅主管機關同意者。四、同一家庭有政府直接興建或貸款自建之國民住宅超過一戶者。五、變更為非居住使用或出租，經通知後逾三十日未予回復或退租者。六、承購後滿三個月經催告仍未進住者。七、積欠管理費達六個月者。」依同條項前段規定：「國民住宅主管機關得收回該住宅及基地，並得移送法院裁定後強制執行」，乃針對特定違約行為之效果賦予執行力之特別規定，此等涉及私權法律關係之事件為民事事件，該條所稱之法院係指普通法院而言。對此類事件有管轄權之普通法院民事庭不得以行政訴訟新制實施，另有行政法院可資受理，而裁定駁回強制執行之聲請。

of a public-housing unit is categorized as a private-law matter, Article 21, Paragraph 1, of the Public Housing Act provides, if any of the following circumstances listed as from (a) through (g) occurs, "the competent public housing authority may retrieve the housing unit and the land on which the unit was built and may apply to the court for a judgment of compulsory enforcement." The contents in (a) to (g) are as follows: (a) to make illegal use of the public-housing unit; (b) to fail to pay the scheduled interests and principal of a loan for three consecutive months and to remain in arrears upon notice; (c) to sell, mortgage, give away as a gift or exchange the public housing unit without the authority's consent; (d) to have more than one public-housing unit built for one family either by the government directly or by that family using loans; (e) to have the public housing unit changed to non-residence use or for lease and neither to recover nor to terminate the lease within thirty (30) days upon notice; (f) upon notice, not to move into the public-housing unit after three (3) months from purchase; or (g) to fail to pay man-

agement expenses for six (6) months. This is a special provision that grants enforcement power to regulate specific violations of the said agreements. Such cases concerning the legal relationship between private rights shall be categorized as civil ones and the courts referred to in this Article shall be ordinary courts. Consequently, ordinary courts having jurisdiction over such cases shall not dismiss the petitions by making a decision rejecting a compulsory enforcement by reason that a new system of administrative litigation has commenced and there are administrative courts to govern the petitions.

Pursuant to Article 178 of the Administrative Proceedings Act, this petition for interpretation is filed with this Yuan by an administrative court with regard to a pending case concerning its authority to adjudicate such a case. To follow the law completely, this Interpretation on the underlying case as to what type of court has the jurisdiction over it shall be a final decision. Consequently, each and every court regardless of its nature shall be bound by such a final decision and no au-

本件係行政法院就繫屬中個案之受理權限問題，依行政訴訟法第一百七十八條向本院聲請解釋，為貫徹法律規定之意旨，本院解釋對該個案審判權歸屬所為之認定，應視為既判事項，各該法院均須遵守，自不得於後續程序中再行審究。而事件經本院解釋係民事事件，普通法院先前以無審判權為由駁回之裁定，係屬對受理事件之權限認定有誤，其裁判顯有瑕疵，應不生拘束力（參照本院釋字第一一五號解釋）。向本院聲請解釋之行政法院除裁定駁回

thority may be found for any court to question the issue of jurisdiction on subsequent proceedings in regard of the underlying case. In addition, where a case is determined by virtue of this Yuan's interpretation as a civil matter but an ordinary court had refused to take up the case by reason of no jurisdiction and thus made a decision to dismiss the filing, such dismissal was made due to the court's misunderstanding of the scope of its jurisdiction and the decision thereof was apparently flawed without binding effects (See J.Y. Interpretation No.115). Hence, the administrative court filing the petition for interpretation with this Yuan shall dismiss the case by a decision and then, pursuant to its authority, transfer the case to an ordinary court having jurisdiction over the case. The court to which the case is being transferred shall, according to the meaning of this Interpretation, bring the case to trial in accordance with the law to protect the people's right of instituting legal proceedings vested by the Constitution. Furthermore, with respect to the issue of jurisdiction, should an ordinary court have a different opinion from that of an administ-

外，並依職權將該民事事件移送有審判權限之普通法院，受移送之法院應遵照本院解釋對審判權認定之意旨，回復事件之繫屬，依法審判，俾保障人民憲法上之訴訟權。又普通法院就受理訴訟之權限與行政法院之見解有異時，相關法律並無相當於前述行政訴訟法第一百七十八條解決審判權衝突之規定，有關機關應依本解釋之釋示，通盤檢討妥為設計，均併此指明。

trative court, due to the lack of relevant law or regulation, as in Article 178 of the Administrative Proceedings Act, to offer a resolution to settle the conflict regarding the issue of jurisdiction between ordinary courts and administrative courts, the relevant authorities should follow the instructions provided for in this Interpretation to re-examine the current problems and thereafter design suitable resolutions to resolve the problems.

Justice Chi-Nan Chen filed dissenting opinion in part.

Justice Sen-Yen Sun filed dissenting opinion in part.

本號解釋陳大法官計男、孫大法官森焱分別提出部分不同意見書。

J. Y. Interpretation No.541（April 4, 2002）*

ISSUE: What is the proper procedure for the nomination and appointment of the president and vice president of the Judicial Yuan, as well as the grand justices prior to the expiry of the 2003 legislative term ?

RELEVANT LAWS:

Article 78 of the Constitution（憲法第七十八條）; Article 5, Paragraph 1, of the Amendments to the Constitution（憲法增修條文第五條第一項）; Articles 3 and 8 of the Organic Act of the Judicial Yuan（司法院組織法第三條及第八條）; Article 5, Paragraph 1, Subparagraph 1, of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第五條第一項第一款）.

KEYWORDS:

the Grand Justices（大法官）, appointment（任命）, constitutional interpretation（憲法疑義之解釋）, nominate（提名）, the power of consent（同意權）,the National Assembly（國民大會）.**

HOLDING: The first part of Article 5, Paragraph 1, of the Amendments to the Constitution (amended on April 25,

解釋文：中華民國八十九年四月二十五日修正公布之憲法增修條文第五條第一項前段規定，司法院設大法官

* Translated by Li-Chih Lin, Esq., J.D.

** Contents within frame, not part of the original text, are added for reference purpose only.

2000) provides that the Judicial Yuan shall consist of 15 Grand Justices and the President shall nominate, with the consent of the Legislative Yuan, one Grand Justice to be the President of the Judicial Yuan and another Grand Justice to be the Vice (Deputy) President of the Judicial Yuan. This part of the Amendments shall be implemented in 2003 and shall be exempted from the prescription set forth in Article 79 of the Constitution. However, the aforementioned part of the Amendments fails to provide an appointment procedure if vacancies occur due to resignation or other reasons before the expiration of the 2003 legislative term. The President of the Judicial Yuan, the Vice (Deputy) President of the Judicial Yuan and the Grand Justices are authorized by the Constitution and its Amendments and are empowered by Article 78 of the Constitution, Article 5 of the Amendments to the Constitution and Articles 3 and 8 of the Organic Act of the Judicial Yuan. The President of the Judicial Yuan, the Vice (Deputy) President of the Judicial Yuan and the Grand Justices are part of the constitutional system. To maintain the integ-

十五人，並以其中一人為院長、一人為副院長，由總統提名，經立法院同意任命之，自中華民國九十二年起實施，不適用憲法第七十九條之規定。關於司法院第六屆大法官於九十二年任期屆滿前，大法官及司法院院長、副院長出缺時，其任命之程序，現行憲法增修條文未設規定。惟司法院院長、副院長及大法官係憲法所設置，並賦予一定之職權，乃憲政體制之一環，為維護其機制之完整，其任命程序如何，自不能無所依循。司法院院長、副院長及大法官由總統提名，經民意機關同意後任命之，係憲法及其增修條文之一貫意旨，亦為民意政治基本理念之所在。現行憲法增修條文既已將司法、考試、監察三院人事之任命程序改由總統提名，經立法院同意任命，基於憲法及其歷次增修條文之一貫意旨與其規範整體性之考量，人事同意權制度設計之民意政治原理，司法院第六屆大法官於九十二年任期屆滿前，大法官及司法院院長、副院長出缺時，其任命之程序，應由總統提名，經立法院同意任命之。

rity of the constitutional system, the appointment procedure must be expressly prescribed in the law. The nomination of the President of the Judicial Yuan, the Vice (Deputy) President of the Judicial Yuan and the Grand Justices by the President, with the consent of the legislative branch of the government, complies with the legislative intent of the Constitution and its Amendments and is consistent with the principle that a democracy is legitimate only if it is based upon the will of the people. Since Article 5, Paragraph 1, of the current Amendments to the Constitution includes a change in the appointment procedure, which provides that the President shall nominate, with the consent of the Legislative Yuan, the executive personnel of the Judicial Yuan, the Examination Yuan, and the Control Yuan, in considering the legislative intent and the integrity of the Constitution and its Amendments, if vacancies occur due to resignation or other reasons before the expiration of the 2003 legislative term, the President shall nominate, with the consent of the Legislative Yuan, the President of the Judicial Yuan, the Vice (Deputy)

President of the Judicial Yuan and the Grand Justices.

REASONING: This application for judicial interpretation was submitted pursuant to the provisions set forth in Article 1, Paragraph 1, Subparagraph 1, of the Constitutional Interpretation Procedure Act by the Secretary of the President on behalf of the President upon the President's instruction. The applicant for this judicial interpretation is the President rather than the Secretary of the President, and this is hereby clarified accordingly.

解釋理由書：本件聲請係總統府秘書長經呈奉總統核示：「應依司法院大法官審理案件法第五條第一項第一款之規定，送請司法院大法官解釋」，乃代函請本院解釋，是本件聲請人係總統而非總統府秘書長，合先敘明。

The first part of Article 5, Paragraph 1, of the Amendments to the Constitution (amended on April 25, 2000) provides that the Judicial Yuan shall consist of 15 Grand Justices and the President shall nominate, with the consent of the Legislative Yuan, one Grand Justice to be the President of the Judicial Yuan and another Grand Justice to be the Vice (Deputy) President of the Judicial Yuan. This part of the Amendments shall be implemented in 2003 and shall be exempted from the prescription set forth in Article 79 of the

中華民國八十九年四月二十五日修正公布之憲法增修條文第五條第一項前段規定，司法院設大法官十五人，並以其中一人為院長、一人為副院長，由總統提名，經立法院同意任命之，自中華民國九十二年起實施，不適用憲法第七十九條之規定。關於司法院第六屆大法官於九十二年任期屆滿前，大法官及司法院院長、副院長出缺時，其任命程序，現行憲法增修條文未設規定。惟司法院院長、副院長及大法官係憲法及其增修條文所設置，並經賦予一定之職權（憲法第七十八條、現行憲法增修條文

Constitution. However, the aforementioned part of the Amendments fails to provide an appointment procedure if vacancies occur due to resignation or other reasons before the expiration of the 2003 legislative term. The President of the Judicial Yuan, the Vice (Deputy) President of the Judicial Yuan and the Grand Justices are authorized by the Constitution and its Amendments and are empowered by Article 78 of the Constitution, Article 5 of the Amendments to the Constitution and Articles 3 and 8 of Organic Act of the Judicial Yuan. The President of the Judicial Yuan, the Vice (Deputy) President of the Judicial Yuan and the Grand Justices are part of the constitutional system. To maintain the integrity of the constitutional system, the appointment procedure must be expressly prescribed in the law. The Grand Justices of the Judicial Yuan are responsible for providing a constitutional interpretation pursuant to the first part of Article 5, Paragraph 1, Subparagraph 1, of the Constitutional Interpretation Procedure Act based upon which the legislature can re-vise this part of the Amendments in accordance with the legislative intent of

第五條、司法院組織法第三條及第八條參照），乃憲政體制之一環，為維護其體制之完整，其任命程序，自不能無所依循。本院大法官職司憲法疑義之解釋（司法院大法官審理案件法第五條第一項第一款前段參照），對於憲法增修條文之上述情形，自應為合於憲法整體規範設計之填補。

the Constitution.

Article 79 of the Constitution provided that the President shall nominate, with the consent of the Control Yuan, the President of the Judicial Yuan, the Vice (Deputy) President of the Judicial Yuan and the Grand Justices. At the time Article 79 of the Constitution was enacted, the Control Yuan exercised the power of consent or veto in accordance with the will of the people. However, during the second term of the National Assembly, Article 13, Paragraph 1, of the Amendments to the Constitution (amended on May 28, 1992) was amended to provide that the President shall nominate, with the consent of the National Assembly, the President of the Judicial Yuan, the Vice (Deputy) President of the Judicial Yuan and the Grand Justices. Therefore, Article 79 of the Constitution was no longer applicable. After Article 13, Paragraph 1, of the Amendments was implemented, the Control Yuan lost the power to consent to or veto the nomination of candidates for the positions of President of the Judicial Yuan, Vice (Deputy) President of the Judicial Yuan and

憲法第七十九條規定，司法院院長、副院長及大法官由總統提名，經監察院同意任命之，是時監察院亦屬民意機關而行使人事同意權，嗣第二屆國民大會於八十一年五月二十八日修正公布之憲法增修條文第十三條第一項規定，司法院院長、副院長及大法官由總統提名，經國民大會同意任命之，不適用憲法第七十九條之規定。自此項規定實施後，監察院對總統提名之司法院院長、副院長及大法官已無同意任命之權限。同屆國民大會於八十三年八月一日復將上述第十三條第一項調整為第四條第一項。第三屆國民大會又於八十六年七月二十一日將該條內容修正，並變動條次為第五條第一項：「司法院設大法官十五人，並以其中一人為院長、一人為副院長，由總統提名，經國民大會同意任命之，自中華民國九十二年起實施，不適用憲法第七十九條之有關規定。」繼於八十九年四月二十五日再將該條由國民大會同意任命之規定，修正為由立法院同意任命之。自憲法與其增修條文之上述歷次增修規定可知，司法院院長、副院長及大法官之提名、任命權屬總統之權限，而其同意權則係由具有民意基

the Grand Justices made by the President. Later during the same term of the National Assembly, Article 13, Paragraph 1, of the Amendments to the Constitution (amended on August 1, 1994) became Article 4, Paragraph 1, of the Amendments to the Constitution. During the third term of the National Assembly, the content of Article 4, Paragraph 1, of the Amendments to the Constitution was again amended and it then became Article 5, Paragraph 1, of the Amendments to the Constitution, which provided that the Judicial Yuan shall consist of 15 Grand Justices and the President shall nominate, with the consent of the National Assembly, one Grand Justice to be the President of the Judicial Yuan and another Grand Justice to be the Vice (Deputy) President of the Judicial Yuan. This part of the Amendments shall be implemented in 2003 and shall be exempted from the prescription set forth in Article 79 of the Constitution. Subsequently, this part of the Amendments was once again amended to provide for the removal of the power of consent or veto from the National Assembly and to transfer it to the Legislative

礎之民意機關行使。此乃憲法及其增修條文之一貫意旨。

Yuan. From the numerous revisions of this part of the Amendments to the Constitution, it is clear that while the nomination of the President of the Judicial Yuan, the Vice (Deputy) President of the Judicial Yuan and the Grand Justices falls within the executive power of the President, the power of consent or veto shall be exercised by a government agency in accordance with the will of the people. This is the legislative intent of the Constitution and its Amendments.

By amending several Amendments to the Constitution, the third term of the National Assembly made substantial changes in the establishment and authority of the National Assembly itself. Besides specifying the authority of the National Assembly in Article 1 of the Amendments to the Constitution, the election of the National Assembly Representatives and the meeting of the National Assembly were strictly limited to the prescribed authority set forth in Article 1 of the Amendments to the Constitution. The National Assembly also amended Article 5, Paragraph 1, Article 6, Paragraph 2, and Article 7, Paragraph 2, of the

第三屆國民大會於八十九年四月二十五日修正公布之憲法增修條文已將國民大會之設置及職權作重大調整，除將國民大會之職權明列於第一條，國民大會代表之選舉與集會，亦以行使該條所定之職權為限，並將總統提名之司法院院長、副院長、大法官，考試院院長、副院長、考試委員及監察院院長、副院長、監察委員之任命同意權，均改由立法院行使（上開增修條文第五條第一項、第六條第二項、第七條第二項參照）。是自現行憲法增修條文施行後，國民大會已無司法院院長、副院長及大法官之同意任命權，國民大會代表亦無從為此而選舉與集會。基於憲法及其增

Amendments to the Constitution to remove the power of consent or veto of the nomination of candidates for the positions of President of the Judicial Yuan, Vice (Deputy) President of the Judicial Yuan, the Grand Justices, President of the Examination Yuan, Vice (Deputy) President of the Examination Yuan, the Commissioners of the Examination Yuan, President of the Control Yuan, Vice (Deputy) President of the Control Yuan, and the Commissioners of the Control Yuan from the National Assembly and transfer it to the Legislative Yuan. As a result, after the aforementioned Amendments to the Constitution were implemented, the National Assembly lost the power to consent to or veto the nomination of candidates for the positions of President of the Judicial Yuan, Vice (Deputy) President of the Judicial Yuan, and the Grand Justices made by the President. Therefore, it was no longer necessary to hold an election of National Assembly Representatives and a meeting of the National Assembly to exercise the power of consent or veto. In considering the integrity of the Constitution and its Amendments, if vacancies

修條文規範整體性之要求，司法院院長、副院長及第六屆大法官出缺時，總統對缺額補行提名，應由立法院行使同意權，以符民主政治應以民意為基礎始具正當性之基本理念。憲法與其增修條文之上開各項人事任命同意權制度，應係本此意旨所為之設計。對總統之司法院院長、副院長及大法官提名，於國民大會已無任命同意權後，其任命同意權即應由民意機關之立法院行使。是以司法院第六屆大法官於九十二年任期屆滿前，大法官及司法院院長、副院長出缺而影響司法院職權之正常運作時，其任命之程序，應由總統提名，經立法院同意任命之。

occur due to resignation or other reasons before the expiration of the 2003 legislative term, the President shall nominate, with the consent of the Legislative Yuan, the President of the Judicial Yuan, the Vice (Deputy) President of the Judicial Yuan and the Grand Justices, and this is consistent with the principle that a democracy is legitimate only if it is based upon the will of the people. The power of consent or veto set forth in the Constitution and its Amendments was designed to implement this legislative intent. After the power of consent to or veto of the nomination of candidates for the positions of President of the Judicial Yuan, Vice (Deputy) President of the Judicial Yuan, and Grand Justices made by the President has been removed from the National Assembly and transferred to the Legislative Yuan, this power of consent or veto shall be exercised by the Legislative Yuan. As a result, if vacancies occur due to resignation or other reasons before the expiration of the 2003 legislative term, which adversely affect the normal operation of the Judicial Yuan, the President shall nominate, with the consent of the Legislative

Yuan, the President of the Judicial Yuan, the Vice (Deputy) President of the Judicial Yuan and the Grand Justices.

Justice Vincent Sze filed concurring opinion.

Justice Tsay-Chuan Hsieh filed concurring opinion.

Justice Tieh-Cheng Liu filed dissenting opinion in part.

Justice Hsiang-Fei Tung filed dissenting opinion.

本號解釋施大法官文森、謝大法官在全分別提出協同意見書；劉大法官鐵錚提出一部不同意見書；董大法官翔飛提出不同意見書（程序部分）。

J. Y. Interpretation No.542（April 4, 2002）*

ISSUE: Is the administrative ordinance, which requires residents of the reservoir catchment area to be relocated out of the area, a proper means to the end of water resource protection, thus complying with the constitutional principle of proportionality? Is the said ordinance adopting the household registry records of residents in the reservoir catchment area as the sole indicator of actual residence in the said area for determining the granting of relocation compensation appropriate, thus conforming to the constitutional principle of equality?

RELEVANT LAWS:

Articles 7, 10 and 23 of the Constitution（憲法第七條、第十條及第二十三條）; J. Y. Interpretations Nos. 443, 454 and 485（司法院釋字第四四三號、第四五四號、第四八五號解釋）; Article 11 of the Water Supply Act（自來水法第十一條）; Implementation Plan for the Relocation of Residents in the Bi Shan, Yun An and Ge To Villages of the Shrdiang County, Feitsui Reservoir Catchment Area（翡翠水庫集水區石碇鄉碧山、永安、格頭三村遷村作業實施計畫）.

KEYWORDS:

catchment area（集水區）, relocation（遷移）, vacate（遷離）, water supply region（水源區）, administrative ordi-

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* Translated by Wei-Feng Huang of THY Taiwan International Law Offices.

** Contents within frame, not part of the original text, are added for reference purpose only.

nances（行政命令）, compensatory（給付性）, administrative measures（行政措施）, administrative grant（給付行政）, relocation compensation（安遷救濟金）, principle of proportionality（比例原則）, principle of equality（平等原則）.**

HOLDING: Article 10 of the Constitution has expressly provided that the people shall have the freedom of residence and migration. Any restriction on this freedom shall not exceed the degree of necessity required by Article 23 of the Constitution, and must be mandated by the law. The foregoing has been explained by this Yuan's Interpretations Nos. 443 and 454. Article 11 of the Water Supply Act authorizes administrative bodies to make provisions for the "classification of the water quality and quantity protection area and the prohibition of any activity that is likely to be hazardous to the water quality and quantity in the said area." Pursuant to this authorization, the relevant authority announced an "Implementation Plan for the Relocation of Residents in the Bi Shan, Yun An and Ge To Villages of

解釋文：人民有居住及遷徙之自由，憲法第十條設有明文。對此自由之限制，不得逾憲法第二十三條所定必要之程度，且須有法律之明文依據，業經本院作成釋字第四四三號、第四五四號等解釋在案。自來水法第十一條授權行政機關得為「劃定公布水質水量保護區域，禁止在該區域內一切貽害水質與水量之行為」，主管機關依此授權訂定公告「翡翠水庫集水區石碇鄉碧山、永安、格頭三村遷村作業實施計畫」，雖對人民居住遷徙自由有所限制，惟計畫遷村之手段與水資源之保護目的間尚符合比例原則，要難謂其有違憲法第十條之規定。

the Shrdiang County, Feitsui Reservoir Catchment Area." Although the Plan places a restriction on the people's freedom of residence and migration, it cannot be said to have infringed upon Article 10 of the Constitution since the means of relocation conforms to the principle of proportionality when considering the end─the protection of water resources.

The administrative ordinances, set down by administrative bodies, having the nature of compensatory administrative measures, which grant benefits to the people, should be bound by the relevant constitutional principles, especially the principle of equality. Provisions for payment of relocation compensation in the aforementioned Implementation Plan are a type of Leistungsverwaltung, which gives benefits to the people with an aim to assist residents financially in vacating the catchment area. Since the ultimate objective is to relocate residents out of the area, the prerequisite for an Leistungsverwaltung should be that of actual residence, with listings on the household registry being one indicator of actual residence.

行政機關訂定之行政命令，其屬給付性之行政措施具授與人民利益之效果者，亦應受相關憲法原則，尤其是平等原則之拘束。系爭作業實施計畫中關於安遷救濟金之發放，係屬授與人民利益之給付行政，並以補助集水區內居民遷村所需費用為目的，既在排除村民之繼續居住，自應以有居住事實為前提，其認定之依據，設籍僅係其一而已，上開計畫竟以設籍與否作為認定是否居住於該水源區之唯一標準，雖不能謂有違平等原則，但未顧及其他居住事實之證明方法，有欠周延。相關領取安遷救濟金之規定應依本解釋意旨儘速檢討改進。

However, the abovementioned Plan adopts household registry records as the sole indicator of actual residence in the said water supply region, and although it does not contradict the principle of equality, it is inadequate as it fails to take into account other means of proving actual residence. Therefore, the relevant provisions regarding the receipt of relocation compensation must be amended in line with this Interpretation.

REASONING: The internal guidelines of administrative bodies assume the status of legislation once they are proclaimed or announced to take effect. Those guidelines that have not been proclaimed or announced but have the effect of regulating people's rights and obligations in general and have became the basis of concrete administrative measures are regulations applicable to the public; that is, they have the same status as legislations, ordinances or administrative rules and are subject to review by this Yuan. The aforementioned "Implementation Plan for the Relocation of Residents in the Bi Shan, Yun An and Ge To Vil-

解釋理由書：行政機關內部作業計畫，經公告或發布實施，性質上為法規之一種；其未經公告或發布，但具有規制不特定人權利義務關係之效用，並已為具體行政措施之依據者，則屬對外生效之規範，與法規命令或行政規則相當，亦得為本院審查對象。本件系爭之「翡翠水庫集水區石碇鄉碧山、永安、格頭三村遷村作業實施計畫」，係先經行政院核定，並由台北水源特定區管理委員會八十五年三月六日八五北水一字第一八五五號公告，應屬行政命令而予以審查，合先敘明。

lages of the Shrdiang County, Feitsui Reservoir Catchment Area" has been approved by the Executive Yuan and proclaimed by the Taipei Special Water Supply Region Management Committee, Ordinance No.1855 of March 6, 1996. Thus the Plan shall be reviewed as an administrative ordinance.

Article 10 of the Constitution has expressly provided that the people shall have the freedom of residence and migration. In order to construct reservoirs, the government may expropriate the people's property with compensation. Once reservoirs have been built, administrative bodies may restrict activities of residence and movement in certain areas in order to maintain the purity and safety of the water source, the quality and quantity in the catchment area. However, such restriction on the people's freedom of residence and migration shall not exceed the degree of necessity required by Article 23 of the Constitution and must be mandated by the law. The foregoing has been explained by this Yuan's Interpretations Nos. 443 and 454. Article 11 of the Water Supply Act

按人民有居住及遷徙之自由，憲法第十條設有明文。政府為興建水庫，得徵收人民之財產，並給予補償，而於水庫興建後，為維護集水區之水源、水質、水量之潔淨與安全，行政機關固得限制人民於該特定區域內之居住、遷徙等活動，惟該等居住遷徙自由之限制，不得逾憲法第二十三條所定之必要程度，且須有法律之明文依據，業經本院作成釋字第四四三號、第四五四號等解釋在案。自來水法第十一條授權行政機關得為「劃定公布水質水量保護區域，禁止在該區域內一切貽害水質與水量之行為」，故翡翠水庫興建後，主管機關依此授權訂定「翡翠水庫集水區石碇鄉碧山、永安、格頭三村遷村作業實施計畫」，係以保護水源區內之水質、水量為目的，其所使用之手段非僅有助於上述目的之達成且屬客觀上所必要，雖對

authorizes administrative bodies to make provisions for the "classification of the water quality and quantity protection area and the prohibition of any activity that is likely to be hazardous to the water quality and quantity in the said area." Thus, after the Feitsui Reservoir was built, the competent authority announced an "Implementation Plan for the Relocation of Residents in the Bi Shan, Yun An and Ge To Villages of the Shrdiang County, Feitsui Reservoir Catchment Area" pursuant to the aforementioned authorization. The Plan seeks to preserve the water quality and quantity in the protected water supply region, and the means it adopts are necessary, from an objective point of view, to achieve this. Although the Plan places a restriction on the people's freedom of residence and migration, it cannot be said to have infringed upon Article 10 of the Constitution since the means of relocation conforms to the principle of proportionality when considering the end ─the protection of water resource.

人民居住遷徙自由有所限制，惟遷村計畫之手段與水資源之保護目的間尚符比例原則，要難謂有違憲法第十條之規定。

The administrative ordinances, set down by administrative bodies, having the

行政機關訂定之行政命令，其屬給付性之行政措施具授與人民利益之效

nature of compensatory administrative measures, which grant benefits to the people, should be bound by the relevant constitutional principles, especially the principle of equality. According to this Yuan's Interpretation No.485, all social policy legislations shall be appropriate in their aims, being efficient use and proper allocation of resources, shall adopt means that are objectively necessary to help achieve the aims, and shall take into consideration the efficiency of such means and whether they are proportional in the achievement of the aims. Provisions for payment of relocation compensation in the aforementioned Implementation Plan are a type of Leistungsverwaltung which financially assists residents to vacate the catchment area, and stops activities of any residence and livelihoods of the area in order to maintain the purity and safety of the water source, the quality and quantity in the catchment area. Such provisions are appropriate in their aims. Since the ultimate aim is to vacate residences from the area, the prerequisite for an Leistungsverwaltung should be that of actual residence, with listings on the household reg-

果者，亦應受相關憲法原則，尤其是平等原則之拘束。按關於社會政策之立法，依本院釋字第四八五號解釋之意旨，在目的上須具資源有效利用、妥善分配之正當性，在手段上須有助於目的之達成且屬客觀上所必要，亦即須考量手段與目的達成間之有效性及合比例性。查上開作業實施計畫中關於安遷救濟金發放之規定，係屬授與人民利益之給付行政，為補助居民遷離集水區，停止區域內之居住、作息等生活活動，以維持集水區內水源、水質、水量之潔淨與安全，自有其目的上正當性。是其既在排除村民之繼續居住，自應以有居住事實為前提，而其認定之依據，設籍僅係其中之一種方法而已，前開計畫竟以設籍與否作為認定是否居住於該水源區之唯一判斷標準，將使部分原事實上居住於集水區內之遷移戶，僅因未設籍而不符發放安遷救濟金之規定，其雖不能謂有違於平等原則，但未顧及其他居住事實之證明方法，有欠周延。按戶籍僅係基於特定目的所為之行政管制措施，如行政機關基於行政上之便利將戶籍為超出該特定目的範圍之使用，而以設籍與否為管制之要件，固非法所不許，但仍應遵循憲法第七條之平等原則。凡能以其他方式舉證證明其於上揭公告所示

istry being just one indicator of actual residence. However, the aforementioned Plan adopts household registry records as the sole determinant of actual residence in the said water supply region. This will exclude the residents who have actually been residing in and have vacated the water supply region from getting the benefit of relocation compensation. Although this does not contradict the principle of equality, it is inadequate as it fails to take into consideration other means of proving actual residence. In general, household registration is only an administrative control measure for special purposes. The law does not prohibit administrative bodies from utilizing household registration outside the scope of such purposes, for administrative convenience, and adopting household registration as the control mechanism, but they must conform to the principle of equality in Article 7 of the Constitution. Those individuals who can prove long-term residence in the water supply region before the date of the abovementioned Ordinance should be awarded relocation compensation by administrative bodies despite not having

日期（中華民國六十九年一月一日）以前有於集水區內長期居住之事實者，縱未設籍，行政機關仍應為安遷救濟金之發給。系爭作業實施計畫中關於認定有無居住事實之規定，應依本解釋意旨儘速檢討改進。

such household registration. Provisions for determining actual residence in the said Implementation Plan should be reviewed and amended in line with this Interpretation.

J. Y. Interpretation No.543（May 3, 2002）*

ISSUE: In case of time constraint wherein the provisions of the president's emergency decrees for detail and technicality are impracticable, may the Executive Yuan, in order to achieve its objectives, issue supplementary regulations?

RELEVANT LAWS:

Articles 23 and 43 of the Constitution（憲法第二十三條、第四十三條）; Article 2, Paragraph 3 of the Amendments to the Constitution（憲法增修條文第二條第三項）; Article 5, Paragraph 1, Subparagraph 3, of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第五條第一項第三款）Article 15, Paragraphs 1, 2 and 3 of the Legislative Yuan Functioning Act（立法院職權行使法第十五條第一項、第二項、第三項）; Emergency Decree Execution Outline of September 25, 1999（中華民國八十八年九月二十五日緊急命令執行要點）.

KEYWORDS:

emergency decrees（緊急命令）, supplementary orders（補充規定）, security of the State（國家安全）, ratification（追認）, imminent danger（迫在眉睫的危險）, financial crisis（財政危機）, economic crisis（經濟危機）.**

* Translated by Wei-Feng Huang of THY Taiwan International Law Offices.

** Contents within frame, not part of the original text, are added for reference purpose only.

HOLDING: Article 2, Paragraph 3, of the Amendments to the Constitution provides that "The President may, in order to avert imminent danger affecting the national security or of the people or to cope with any major financial or economic crisis, issue emergency decrees and take all necessary measures through resolution of the Cabinet meeting, and is not subject to the restriction specified in Article 43 of the Constitution. However, such decrees shall, within ten days of issuance, be submitted to the Legislature for ratification. Where ratification is denied by the Legislature, the said emergency decrees shall cease to be valid." Accordingly, emergency decrees are proclamations, made by the President to deal with imminent dangers or major crisis, which are directly authorized by the Constitution and have the effect of temporarily replacing or altering the law. As a principle, their content should be thorough and detailed so they can be executed forthwith without the need of supplementary regulations. In case of time constraint where provisions for detail and technicality are impracticable, and supplementary regula-

解釋文：憲法增修條文第二條第三項規定：「總統為避免國家或人民遭遇緊急危難或應付財政經濟上重大變故，得經行政院會議之決議發布緊急命令，為必要之處置，不受憲法第四十三條之限制。但須於發布命令後十日內提交立法院追認，如立法院不同意時，該緊急命令立即失效。」由此可知，緊急命令係總統為應付緊急危難或重大變故，直接依憲法授權所發布，具有暫時替代或變更法律效力之命令，其內容應力求周延，以不得再授權為補充規定即可逕予執行為原則。若因事起倉促，一時之間不能就相關細節性、技術性事項鉅細靡遺悉加規範，而有待執行機關以命令補充，方能有效達成緊急命令之目的者，則應於緊急命令中明文規定其意旨，於立法院完成追認程序後，再行發布。此種補充規定應依行政命令之審查程序送交立法院審查，以符憲政秩序。又補充規定應隨緊急命令有效期限屆滿而失其效力，乃屬當然。

tions by executive authorities are required to achieve the objectives of emergency decrees, then the decrees must contain provisions expressing their objectives and be proclaimed only after ratification by the Legislature. To adhere to the constitutional structure, supplementary regulations should be reviewed by the Legislature in accordance with the review procedures in administrative orders. Once the effective period of emergency decrees elapses, the supplementary regulations shall forthwith cease to be valid.

REASONING: The occurrence of a rare major earthquake in Taiwan on September 21, 1999, prompted the President to issue an emergency degree on September 25 of the same year. To execute the emergency decree, the Executive Yuan drafted and submitted to the Legislature, for their information, the "Emergency Decree Execution Outline of September, 1999" (hereinafter referred to as the "Execution Outline"). Mr. Chi-Mai Chen and 78 other Members of the Legislature applied to this Yuan for an interpretation as to the constitutionality of the

解釋理由書：台灣地區於中華民國八十八年九月二十一日遭遇罕見之強烈地震，經總統於同年九月二十五日發布緊急命令。行政院為執行緊急命令，特訂「中華民國八十八年九月二十五日緊急命令執行要點」（以下簡稱執行要點），以登知案方式函送立法院。立法院陳其邁等七十八位立法委員對於該執行要點是否合憲，以及立法院有無審查之職權發生適用憲法之疑義，聲請解釋。核與司法院大法官審理案件法第五條第一項第三款規定相符，合先說明。

Execution Outline and of the Legislature's authority to review. The said application, in this Yuan's view, conformed to Article 5, Paragraph 1, Subparagraph 3, of the Constitutional Interpretation Procedure Act.

The issuance of emergency decrees under the Constitution is an endeavor to maintain the Nation's existence and restore its constitutional structure in the event of national emergency when the existing legal system is insufficient to eliminate danger or handle a major crisis. The criteria, procedures and review of emergency decrees are governed by the Constitution to prevent misconduct by government authorities and to safeguard the rights of the people and the order of a democratic society. Article 2, Paragraph 3, of the Amendment to the Constitution provides that "The President may, in order to avert imminent danger affecting the national security or of the people or to cope with any major financial or economic crisis, issue emergency decrees and take all necessary measures through resolution of the Cabinet meeting, and is not

憲法上緊急命令之發布，係國家處於緊急狀態，依現有法制不足以排除危難或應付重大變故之際，為維護國家存立，儘速恢復憲政秩序之目的，循合憲程序所採取之必要性措施。故憲法就發布緊急命令之要件、程序及監督機制定有明確規範，以避免國家機關濫用權力，期以保障人民權益，並維護自由民主基本秩序。憲法增修條文第二條第三項規定：「總統為避免國家或人民遭遇緊急危難或應付財政經濟上重大變故，得經行政院會議之決議發布緊急命令，為必要之處置，不受憲法第四十三條之限制。但須於發布命令後十日內提交立法院追認，如立法院不同意時，該緊急命令立即失效。」由此可知，緊急命令係為避免國家或人民遭遇緊急危難或應付財政經濟上重大變故，於國家不能依現有法制，亦不及依循正常立法程序採取必要對策因應之緊急情況下，由總統經行政院會議之決議發布之不得已措

subject to the restriction specified in Article 43 of the Constitution. However, such decrees shall, within ten days of issuance, be submitted to the Legislature for ratification. Where ratification is denied by the Legislature, the said emergency decrees shall cease to be valid." Accordingly, emergency decrees are proclamations made by the President pursuant to resolution of the Cabinet, in order to avert imminent dangers to the State or the people or to deal with a major crisis, when the existing legal system and legislative process are unable to provide countermeasures. The effectiveness of such decree is restricted to a definite emergency period and location and has the effect of temporarily replacing or altering existing laws. Therefore, emergency decrees are an exception to the constitutional rules that the Legislature is to legislate on behalf of the people while the Executive Yuan is responsible for the execution of laws. As a principle, their content should be thorough and detailed so they can be executed forthwith without the need of supplementary regulations. In case of time constraint where provisions for detail and technical-

施，其適用僅限於處置一定期間或地點發生之緊急事故，具有暫時替代法律、變更法律效力之功能。故緊急命令乃對立法部門代表國民制定法律、行政部門負責執行法律之憲法原則特設之例外，以不得再授權為補充規定即可逕予執行為原則，其內容應力求詳盡而周延。若因事起倉促，一時之間不能就相關細節性、技術性事項鉅細靡遺悉加規範，而有待執行機關以命令補充者，則應於緊急命令中明文規定其意旨，並於立法院完成追認程序後，由執行機關再行發布。又此種補充規定無論其使用何種名稱均應依行政命令之審查程序送交立法院審查，以符憲政秩序。緊急命令之發布，雖不受憲法第二十三條所揭示法律保留原則之限制，惟仍應遵守比例原則。至上開憲法增修條文規定，緊急命令應於發布後十日內提交立法院追認，則係對此種緊急措施所設之民意監督機制。立法院就緊急命令行使追認權，僅得就其當否為決議，不得逕予變更其內容，如認部分內容雖有不當，然其餘部分對於緊急命令之整體應變措施尚無影響而有必要之情形時，得為部分追認。

ity are impracticable and supplementary regulations by the executive authorities are required to achieve objectives of emergency decrees, then the decrees must contain a provision expressing their objectives and be proclaimed only after ratification by the Legislature. To adhere to the constitutional structure, supplementary regulations (or by whatever term it is named) should be reviewed by the Legislature in accordance with the review procedures set out in the administrative orders. The issuance of emergency decrees, though not restricted by the principle of legal reservation stipulated in Article 23 of the Constitution, should observe the principle of proportionality. The requirement of ratification by the Legislature, within 10 days of issuance of emergency decrees, stipulated in the said Amendment to the Constitution is a representative review mechanism for the emergency measure. The Legislature, upon exercising its power of ratification, may only resolve as to the appropriateness of emergency decrees but not alter their contents. Where some parts of an emergency decree are considered to be inappropriate, partial

ratification is available if the remainder of the decree has no impact on and is necessary to the entirety of the emergency measure.

Emergency decrees issued by the President pursuant to the said Amendment must be delivered to the Legislature for ratification under Article 15, Paragraphs 1 and 2, of the Legislative Yuan Functioning Act. During the recess of the Legislature, the legislators in recess shall meet within three days and ratify such decrees within seven days pursuant to Paragraph 3 of the said Article. Further, supplementary regulations contingent to an emergency decree issued by the Executive Yuan shall cease to be valid once the effective period of the decree elapses. Upon enactment of laws on the relevant emergency measures by the Legislature to replace the contents of emergency decrees, such decrees shall forthwith cease to be valid to the extent of the enactment.

總統依上開增修條文規定發布緊急命令後，應於十日內送立法院依立法院職權行使法第十五條第一項及第二項追認。若適逢立法院解散，則依同條第三項規定，已遭解散的立法委員應於三日內自行集會，並在七日內追認。又行政院依緊急命令發布之補充規定應隨緊急命令有效期限屆滿而失其效力；立法院如經制定相關因應措施之法律以取代緊急命令之規範內容時，緊急命令應於此範圍內失效，乃屬當然。

The matters of whether executive authorities may issue supplementary regulations after issuance of emergency decrees

緊急命令發布後，執行命令之行政機關得否為補充規定，又此項規定應否送請立法機關審查，於本解釋公布

and whether such orders should be presented for review by the legislative authorities were, prior to this Interpretation, pending under the existing laws. Thus, although the issuance of the said emergency decree on September 25, 1999, by the President, and the draft of the contingent Executive Outline by the Executive Yuan failed to comply with the procedures set out above, there was no breach of the Constitution.

前，現行法制規範未臻明確，是總統於八十八年九月二十五日發布前揭緊急命令，行政院就此訂定之執行要點，應遵循之程序，與上開意旨，雖有未合，尚不生違憲問題。

Justice Hsiang-Fei Tung filed dissenting opinion.

本號解釋董大法官翔飛提出不同意見書。

J. Y. Interpretation No.544（May 17, 2002）*

ISSUE: Are the relevant provisions of the Narcotics Control Act and the Narcotics Elimination Act, which impose penalty of imprisonment on users of drugs or narcotics, in violation of the Constitutional?

RELEVANT LAWS:

Articles 8 and 23 of the Constitution（憲法第八條及第二十三條）, J.Y. Interpretation No. 476（司法院釋字第四七六號解釋）, Article 9, Paragraph 1, of the Narcotics Elimination Act（肅清煙毒條例第九條第一項）, Article 13-1, Paragraph 2, Subparagraph 4, of the Narcotics Control Act（麻醉藥品管理條例第十三條之一第二項第四款）, Article 35, Subparagraph 4, of the Drug Control Act（毒品危害防治條例第三十五條第四款）, Article 20 of the Act for Controlled Drugs（管制藥品管理條例第二十條）, Article 2, Paragraph 3, of the Criminal Code（刑法第二條第三項）.

KEYWORDS:

criminal sanction（刑罰）, anti-social behavior（反社會性行為）, fundamental rights（基本權利）, the principle of proportionality（比例原則）, rehabilitation（勒戒）, public interest（公益）, drug addiction（毒品成癮）, protective discipline（保護管束）, first offender（初犯者）.**

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* Translated by Li-Chih Lin, Esq., JD.

** Contents within frame, not part of the original text, are added for reference purpose only.

HOLDING: The criminal sanction imposed upon an individual by the government is a necessary compulsory means. The kind of criminal sanction that shall be imposed for a particular kind of anti-social behavior is to be determined by the legislature at their discretion. It has been clarified in J.Y. Interpretation No. 476 that some special criminal Acts enacted especially for certain crimes do not violate the principle of proportionality if those special criminal Acts have due purposes, necessary means, and proper restrictions as required by Article 23 of the Constitution.

解釋文：國家對個人之刑罰，屬不得已之強制手段，選擇以何種刑罰處罰個人之反社會性行為，乃立法自由形成之範圍。就特定事項以特別刑法規定特別罪刑，倘與憲法第二十三條所要求之目的正當性、手段必要性、限制妥當性符合者，即無乖於比例原則，業經本院釋字第四七六號解釋闡釋在案。

Imprisonment is a serious restriction on physical liberty. It is proper and reasonable only if it is necessary to compulsorily isolate criminals for rehabilitation for the purpose of maintaining the social order. The sentencing determination shall take into consideration the harmful effect of the criminal act to be sanctioned and the significance of the public interest to be protected. The use of narcotics damages the physical and mental well-being of narcotic users and leads to the perpetration of

自由刑涉及對人民身體自由之嚴重限制，除非必須對其採強制隔離施以矯治，方能維護社會秩序時，其科處始屬正當合理，而刑度之制定尤應顧及行為之侵害性與法益保護之重要性。施用毒品，足以戕害身心，滋生其他犯罪，惡化治安，嚴重損及公益，立法者自得於抽象危險階段即加以規範。中華民國八十一年七月二十七日修正公布肅清煙毒條例第九條第一項規定，對於施用毒品或鴉片者，處三年以上七年以下有期徒刑，及八十四年一月十三日修正公布

crimes causing serious harm to society. Therefore, the legislature must take necessary measures to regulate narcotics use and imprison narcotic users to prevent the widespread use of narcotics. Article 9, Paragraph 1, of the Narcotics Elimination Act, which was revised and promulgated on July 27, 1992, provides that anyone who has been convicted of using narcotics, shall be sentenced to three to seven years of imprisonment. Article 13-1, Paragraph 2, Subparagraph 4, of the Narcotics Control Act, which was revised and promulgated on January 13, 1995, provides that anyone who has been convicted of using narcotics illegally, shall be sentenced to no more than three years of imprisonment or detention, or shall be fined no more than 10,000 NT Dollars. While Article 13-1, Paragraph 2, Subparagraph 4, of the Narcotics Control Act is applicable to anyone who has been convicted of using narcotics illegally regardless of whether the narcotic user is addicted to the narcotics or not, or regardless of the detrimental effect caused by the use of the narcotics, the purpose of the regulation is to deter narcotics use by imposing crimi-

之麻醉藥品管理條例第十三條之一第二項第四款規定，非法施打吸用麻醉藥品者，處三年以下有期徒刑、拘役或一萬元以下罰金，雖以所施用之毒品屬煙毒或麻醉藥品為其規範對象，未按行為人是否業已成癮為類型化之區分，就行為對法益危害之程度亦未盡顧及，但究其目的，無非在運用刑罰之一般預防功能以嚇阻毒品之施用，挽社會於頹廢，與首揭意旨尚屬相符，於憲法第八條、第二十三條規定並無牴觸。前開肅清煙毒條例及麻醉藥品管理條例於八十七年及八十八年相繼修正，對經勒戒而無繼續施用毒品傾向者，改採除刑不除罪，對初犯者以保安處分替代刑罰，已更能符合首揭意旨。由肅清煙毒條例修正之毒品危害防制條例第三十五條第四款，將判決確定尚未執行或執行中之案件排除其適用，此固與刑法第二條第三項無乖離之處，惟為深化新制所揭櫫之刑事政策，允宜檢討及之。

nal sanction. Therefore, Article 13-1, Paragraph 2, Subparagraph 4, of the Narcotics Control Act complies with the principle of proportionality and is consistent with Articles 8 and 23 of the Constitution. The Narcotics Elimination Act was revised and renamed the Drug Control Act on May 20, 1998, and the Narcotics Control Act was revised and renamed the Narcotics Control Act on June 2, 1999 [More specific information is provided here to avoid confusion about which Act or Act is which.]. The Narcotics Control Act provides various public security sanctions including rehabilitation, medical treatment and protective discipline for narcotics users based on their level of drug use. As for those narcotic users who are first offenders and those who are second offenders but who have stated their intention to abstain from drug use after rehabilitation, their criminal sentence will be revoked under the Narcotics Control Act. Article 35, Subparagraph 4, of the Drug Control Act provides that the provisions set forth in the Narcotics Elimination Act are applicable to executive or executory judgments rendered before the

revision of the Drug Control Act. As a result, Article 20 of the Act for Controlled Drugs is inapplicable to executive or executory judgments rendered in accordance with the Narcotics Elimination Act and the Narcotics Control Act. While the provision set forth in Article 20 of the Act for Controlled Drugs is consistent with Article 2, Paragraph 3, of the Criminal Code, it should be reviewed and amended in order to comply with the legislative intent of the newly revised Drug Control Act.

REASONING: The criminal sanction imposed upon an individual by the government is a necessary compulsory means. To invoke criminal sanction for various types of anti-social behavior, the legislative intent of the criminal sanction must be legitimate and the means to achieve the legislative intent must be effective without other less intrusive alternatives. In addition, the restriction imposed upon fundamental human rights by the criminal punishment, the significance of the public interests protected by the legislature and the detrimental effect

解釋理由書：國家對個人之刑罰，屬不得已之強制手段，選擇以刑罰處罰個人之反社會性行為，須刑事立法之目的具有正當性，施以刑罰有助於立法目的之達成，且別無其他侵害較小亦能達成相同目的之手段可資運用時，始得為之；而刑罰對基本權利之限制與立法者所欲維護法益之重要性及行為對法益危害之程度，尚須處於合乎比例之關係。至何種行為構成犯罪，應處以何種刑罰，刑罰是否為達成立法目的之適當且必要手段，以及判斷相關行為對個人或社會是否造成危害，乃立法者自由形成之範圍。就特定事項經評價為刑事不

caused by the anti-social behavior, must be proportional. The kind of anti-social behavior that constitutes a criminal offense, the kind of criminal sanction that shall be imposed, whether the criminal punishment is a proper and necessary means to achieve the legislative intent, and whether a particular behavior will adversely affect an individual or the society are to be determined by the legislature within their discretion. It has been clarified in J.Y. Interpretation No. 476 that some special criminal Acts enacted especially for certain crimes do not violate the principle of proportionality if those special criminal Acts have due purposes, necessary means, and proper restrictions as required by Article 23 of the Constitution.

法行為，以特別刑法規定特別罪刑，倘與憲法第二十三條所要求之目的正當性、手段必要性、限制妥當性符合者，即無乖於比例原則，業經本院釋字第四七六號解釋闡釋在案。

Imprisonment is a serious restriction on physical liberty. It is proper and reasonable only if it is necessary to compulsorily isolate criminals for rehabilitation for the purpose of maintaining the social order. The sentencing determination shall take into consideration the harmful effect of the criminal act to be sanctioned and

自由刑涉及對人民身體自由之嚴重限制，除非必須對其採強制隔離施以矯治，方能維護社會秩序時，其科處始屬正當合理，而刑度之制定尤應顧及行為之侵害性與法益保護之重要性。施用毒品，或得視為自傷行為，然其影響施用者之中樞神經系統，導致神智不清，產生心理上及生理上之依賴性，積習成

the significance of the public interest to be protected. The use of narcotics is a self-inflicted harm and it will affect the central neural system of the narcotic user, causing hallucinations and subsequent psychological and physical dependency. A long-term user of narcotics will become addicted to narcotics. Once the user becomes addicted to narcotics, it is difficult for the user to abstain from drug use. Drug addiction will adversely affect the user's life, the ability to work and subsequently may destroy his or her family. Without the normal routine of life, the ability to work and the support from his or her family, the narcotic user will become a burden on his or her family and society. The worst situation is that a long-term narcotic user will commit major crimes to obtain the narcotics he or she needs, causing a threat to public security and a danger to society. Considering the detrimental effect caused to the entire country by narcotics traffic and use, the legislature must take necessary measures to regulate narcotics use and imprison narcotic users to prevent the spread of narcotics. Article 9, Paragraph 1, of the Narcotics Elimination

癮，禁斷困難，輕則個人沈淪、家庭破毀，失去正常生活及工作能力，成為家庭或社會之負擔；重則可能與其他犯罪行為相結合，滋生重大刑事案件，惡化治安，嚴重損及公益。鑒於煙毒對國計民生所造成之戕害，立法者自得採取必要手段，於抽象危險階段即以刑罰規範，對施用毒品者之人身自由為適當限制。八十一年七月二十七日修正公布之肅清煙毒條例第九條第一項規定，對於施用毒品或鴉片者，處三年以上七年以下有期徒刑，及八十四年一月十三日修正公布之麻醉藥品管理條例第十三條之一第二項第四款規定，非法施打吸用麻醉藥品者，處三年以下有期徒刑、拘役或一萬元以下罰金，雖以所施用之毒品屬煙毒或麻醉藥品為其規範對象，未按行為人是否業已成癮為類型化之區分，就行為對法益危害之程度亦未盡顧及，但究其目的，無非在運用刑罰之一般預防功能以嚇阻毒品之施用，補偏救弊，導正社會於頹廢，與首揭意旨尚屬相符，於憲法第八條、第二十三條規定並無牴觸。茲肅清煙毒條例於八十七年五月二十日修正為毒品危害防制條例，前開第九條第一項改列為第十條；麻醉藥品管理條例於八十八年六月二日修正為管制藥品管理條例，將前開第十三條之

Act, which was revised and promulgated on July 27, 1992, provides that anyone who is convicted of using? narcotics shall be sentenced to three to seven years of imprisonment. Article 13-1, Paragraph 2, Subparagraph 4, of the Narcotics Control Act, which was revised and promulgated on January 13, 1995, provides that anyone who is convicted of using narcotics illegally, shall be sentenced to no more than three years of imprisonment or detention, or shall be fined no more than 10,000 NT Dollars. While it is true that Article 13-1, Paragraph 2, Subparagraph 4, of the Narcotics Control Act is applicable to anyone who is convicted of using narcotics illegally regardless of whether the narcotic user is addicted to the narcotics or not, and regardless of the detrimental effect caused by the use of the narcotics, the purpose of the regulation is to deter narcotics use by imposing criminal sanction. Therefore, Article 13-1, Paragraph 2, Subparagraph 4, of the Narcotics Control Act complies with the principle of proportionality and is consistent with Articles 8 and 23 of the Constitution. The Narcotics Elimination Act was renamed the Drug

一之規定一併改列於該防制條例第十條。復於第二十條按毒品之危害性加以分級，並就施用毒品為初犯、再犯或三犯以上，區分為不同之行為型態而予不同之法律效果，並施予勒戒、戒治、保護管束等保安處分措施；對於初犯及再犯經勒戒而無繼續施用毒品傾向者，改採除刑不除罪，已更能符合首揭意旨。

Control Act on May 20, 1998. Article 9, Paragraph 1, of the Narcotics Elimination Act became Article 10 of the Drug Control Act. The Narcotics Control Act was renamed the Act for Control of Narcotics on June 2, 1999. Article 13-1 of the Act for Control of Narcotics became Article 10 of the Act for Control of Narcotics. The Narcotics Control Act was later revised and categorized into different levels based on the different degrees of detrimental effect of narcotics. The Narcotics Control Act also provides various public security sanctions [disciplinary measures] including rehabilitation, medical treatment and protective discipline for different narcotics users based on their level of drug use. As for those narcotic users who are first offenders and those who are second offenders but who have stated their intention to abstain from drug use after rehabilitation, their criminal sentence will be revoked under the Act for Control of Narcotics.

Article 35, Subparagraph 4, of the Drug Control Act stipulates that the provisions set forth in the Narcotics Elimina-

毒品危害防制條例第三十五條第四款規定：「判決確定尚未執行或執行中之案件，適用修正前之規定。」對依

tion Act are applicable to executive or executory judgments rendered before the revision of the Drug Control Act. As a result, Article 20 of the Act for Controlled Drugs is inapplicable to executive or executory judgments rendered in accordance with the Narcotics Elimination Act and the Narcotics Control Act. While the provision set forth in Article 20 of the Act for Controlled Drugs is consistent with Article 2, Paragraph 3, of the Criminal Code, it should be reviewed and amended to comply with the legislative intent of the newly revised Drug Control Act.

前開肅清煙毒條例及麻醉藥品管理條例判刑確定尚未執行或執行中之人排除前開防制條例第二十條以保安處分替代刑罰規定之適用，此固與刑法第二條第三項無乖離之處，惟為深化新制所揭櫫之刑事政策，允宜檢討及之。

J. Y. Interpretation No.545（May 17, 2002）*

ISSUE: Is the discipline of a physician by suspension or revocation of his/her practicing license for illegal or improper conduct under Article 25 of the Physician Act consistent with the spirit of Article 23 of the Constitution?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）; J.Y. Interpretation No.432（司法院釋字第四三二號解釋）; Articles 25, 25-1 and 28-4 of the Physician Act（醫師法第二十五條、第二十五條之一、第二十八條之四）.

KEYWORDS:

physician（醫師）, illegal conduct（違法行為）, improper conduct（不當行為）, suspension from practice（停業處分）, revocation（撤銷）, public health insurance（全民健康保險）.**

HOLDING: The Physician Act promulgated on December 26, 1986, provides, in Article 25, that: "Physicians who engage in illegal or improper conduct in the course of their practice may be disciplined by a one-month to one-year

解釋文：中華民國七十五年十二月二十六日公布之醫師法第二十五條規定：「醫師於業務上如有違法或不正當行為，得處一個月以上一年以下停業處分或撤銷其執業執照。」所謂「業務上之違法行為」係指醫師於醫療業務，

* Translated by Wei-Feng Huang of THY Taiwan International Law Offices.

** Contents within frame, not part of the original text, are added for reference purpose only.

suspension from practice or revocation of practicing license." "Illegal conduct in the course of their practice" refers to conduct in the performance of medical services which may be objectively interpreted, in accordance with professional knowledge, as prohibited by the law. The foregoing is limited to conduct, related to the medical practice, which violates the law, and does not cover all illegal conduct engaged in by physicians in general; hence, its scope is ascertainable. "Improper conduct in the course of their practice" means conduct in the performance of physicians' professional services, which, though not to the extent of being illegal, is contrary to the requirements of the doctrine and ethics of the medical profession. Therefore, such conduct is improper and should be prevented. The law cannot provide for detailed descriptions of all of the abovementioned types of illegal or improper conduct. They are thus governed by indefinite concepts of law, and their meanings to be applied in a specific case are not such that are unascertainable by properly established institutions utilizing their specialized knowledge and the social norm. Such

依專業知識，客觀上得理解不為法令許可之行為，此既限於執行醫療業務相關之行為而違背法令之規定，並非泛指醫師之一切違法行為，其範圍應屬可得確定；所謂「業務上之不正當行為」則指醫療業務行為雖未達違法之程度，但有悖於醫學學理及醫學倫理上之要求而不具正當性應予避免之行為。法律就前揭違法或不正當行為無從鉅細靡遺悉加規定，因以不確定法律概念予以規範，惟其涵義於個案中並非不能經由適當組成之機構依其專業知識及社會通念加以認定及判斷，並可由司法審查予以確認，則與法律明確性原則尚無不合，於憲法保障人民權利之意旨亦無牴觸。首揭規定就醫師違背職業上應遵守之行為規範，授權主管機關得於前開法定行政罰範圍內，斟酌醫師醫療業務上違法或不正當行為之於醫療安全、國民健康及全民健康保險對象暨財務制度之危害程度，而為如何懲處之決定，係為維護醫師之職業倫理，維持社會秩序，增進公共利益所必要，與憲法第二十三條規定之意旨無違。

meanings may also be confirmed by judicial reviews and are not in conflict with the principle of clarity and definiteness of law *(Rechtsbestimmtheitprinzip)* or the constitutional principle of the protection of the people's rights. The first mentioned Article authorizes the competent authorities to discipline physicians, who deviate from conduct required of their profession, by inflicting administrative penalties within the bounds of the abovementioned Act, taking into consideration the effects of such illegal or improper conduct on medical safety, public health and national health insurance beneficiaries, as well as detriments to the financial structure. The decision as to discipline shall serve the purposes of upholding physicians' professional ethics, preserving the social order and improving the public benefit, and shall not be incompatible with Article 23 of the Constitution.

REASONING: Professionals who breach duties imposed by their profession are thus disciplined by law. Insofar as the criteria for discipline are concerned, the legislators' decision to adopt indefinite

解釋理由書：專門職業人員違背其職業上應遵守之義務，而依法應受懲戒處分者，對於該處分之構成要件，立法者衡酌法律所規範生活事實之複雜性及適用於個案之妥當性，使用不確定

concepts of law or catchall provisions to govern such criteria is based on their contemplation of the complexities in attempting to regulate the facts of real-life situations and the appropriateness of applying a certain law to a specific case. If the meanings of the said concepts or provisions are not incomprehensible, and the persons regulated thereby can predict the act or omission of act that constitute breach of duty and induce discipline, and judicial reviews are available for reconfirmation, then they may not be said to contradict the clarity requirement of law (See J.Y. Interpretation No.432).

法律概念或概括條款而為相應之規定者，苟其意義非難以理解，且為受規範者所能預見其何種作為或不作為構成義務之違反及所應受之懲戒，並可由司法審查加以確認，即不得謂與法律明確性原則相違（本院釋字第四三二號解釋參照）。

The Physician Act promulgated on December 26, 1986, provides, in Article 25, that: "Physicians who engage in illegal or improper conduct in the course of their practice may be disciplined by a one-month to one-year suspension from practice or revocation of practicing license." "Illegal conduct in the course of their practice" refers to conduct in the performance of medical services and knowledge, which may be objectively interpreted, pursuant to professional knowledge, as

七十五年十二月二十六日修正公布之醫師法第二十五條規定：「醫師於業務上如有違法或不正當行為，得處一個月以上一年以下停業處分或撤銷其執業執照。」所謂「業務上之違法行為」，係指醫師於醫療業務，依專業知識，客觀上得理解不為法令許可之行為，此既限於執行醫療業務相關之行為而違背法令之規定，並非泛指醫師之一切違法行為，其範圍應屬可得確定；所謂「業務上之不正當行為」則指醫療業務行為雖未達違法之程度，但有悖於醫

prohibited by the law. The foregoing is limited to conduct, related to the medical practice, which violates the law, and does not cover all illegal conduct engaged in by physicians in general; hence, its scope is ascertainable. "Improper conduct in the course of their practice" means conduct in the performance of physicians' professional services, which, though not to the extent of being illegal, is contrary to the doctrine and ethics of the medical profession. Therefore, such conduct is improper and should be prevented. This is especially so when the issue of ethics is involved. The law cannot provide for detailed descriptions of all types of illegal or improper conduct. They are thus governed by indefinite concepts of law, and their meanings to be applied in a case are not such that are unascertainable by properly established institutions utilizing their specialized knowledge and the social norm. Such meanings may be finalized and confirmed by judicial reviews and are not in conflict with the principle of clarity and definiteness of law *(Rechtsbestimmtheitprinzip)* or the constitutional principle of the protection of the people's rights. Arti-

學學理及醫學倫理上之要求而不具正當性應予避免之行為，尤以涉及醫德者為然。法律就前揭違法或不正當行為無從鉅細靡遺悉加規定，因以不確定法律概念予以規範，惟其涵義於個案中並非不能經由適當組成之機構依其專業知識及社會通念加以認定及判斷，最後可由司法審查予以確認，則與法律明確性原則尚無不合，於憲法保障人民權利之意旨亦無牴觸。醫師法第二十五條已於九十一年一月十六日修正公布，該條除同法第二十八條之四所列舉具體違規事實，授權由主管機關直接依情節輕重處以罰鍰、限制執業範圍、停業、廢止其執業執照或醫師證書外，就屬醫學倫理層次之業務上違法或不正當行為分列四款例示，仍於第五款以概括條款規定：「前四款及第二十八條之四各款以外之業務上不正當行為」，並將修正前法律授權訂定醫師懲戒辦法所規定之各種懲戒處分具體明定於醫師法第二十五條之一。至於懲戒程序之發動，則由醫師公會或主管機關移付懲戒。良以不正當行為無從詳予規範，確有必要由專業團體或主管機關於個案判斷是否移送懲戒。

cle 25 of the Physician Act was amended and promulgated on January 16, 2002. The said Article lists illegal or improper conduct, in the ethics respect of physicians' course of practice, in four paragraphs, with the exception of Article 28-4 which authorizes the competent authorities to impose disciplinary measures of penalty charges, restrictions on the scope of or suspension from practice, or revocation of practicing license or doctor's certificate at their discretion. Article 25 also provides a catchall provision in Paragraph 5: "improper conduct in the course of physicians' practice which falls outside of the above four paragraphs and Article 28-4." The various disciplinary measures, contained in disciplinary rules authorized by law, are clearly stipulated in the amended Article 25-1. As to disciplinary proceedings, they are to be initiated and referred to the disciplinary commission by the Physicians' Association and the competent authorities. Because it is impracticable to describe in detail all the types of improper conduct, it becomes necessary for specialized groups or the competent authorities to determine whether to refer a

case to the disciplinary commission.

Physicians provide patients and insurance beneficiaries with medical, health, and other related services in respect of medicine and national health insurance coverage. Any illegal or improper conduct will jeopardize medical safety and public health. If, at the same time, physicians charge improper fees under health insurance for personal benefit, this will increase the financial burden of national health insurance, thus affecting the people's insurance burden and jeopardizing the development of the national health insurance system. Prior to the amendment of the first-mentioned Article of the Physician Act, physicians who deviate from the conduct required of their profession will be disciplined by "a one-month to one-year suspension from practice or revocation of practicing license" as imposed by the competent authorities according to the degree of severity of the illegal or improper conduct. The above is essential to the upholding of physicians' professional ethics, the advancement of public health, the betterment of the quality

醫師於醫療、全民健康保險特約事項，提供病患或被保險人醫療保健及其他相關服務，如有違法或不正當行為，將危害醫療安全、國民健康，若同時因其個人謀取健康保險之不當醫療費用，則將侵蝕全民健康保險財務，致影響全民保費負擔，危及全民健康保險制度之健全發展。醫師法首揭規定修正前，就醫師違背職業上應遵守之行為，授權主管機關視違法或不正當行為之危害程度，「得處一個月以上一年以下停業處分或撤銷其執業執照」決定其懲處，乃為維護醫師職業倫理，促進國民健康、提昇醫療服務品質，維持社會秩序，增進公共利益所必要，與憲法第二十三條亦無違背。

of medical services, the preservation of the social order and the improvement of public interests, and is not incompatible with Article 23 of the Constitution.

J. Y. Interpretation No.546（May 31, 2002）*

ISSUE: Is the Judicial interpretation Y. T. No. 2810, in interpreting to the effect that an administrative appeal should be denied if no substantive legal benefit exists, in violation of the Constitution?

RELEVANT LAWS:

Articles 16, 17 and 18 of the Constitution（憲法第十六條、第十七條、第十八條）; J. Y. Yuan-Tze No. 2810（司法院院字第二八一〇號解釋）; Articles 1 and 7 of the Administrative Appeal Act（訴願法第一條、第七條）; Article 35-I (ii) of the Public Officials Election and Recall Act（公職人員選舉罷免法第三十五條第一項第二款）; Article 13-I of the Regulation Governing the Deliberation and Review of Administrative Appeals by the Administrative Appeal Review Committees of the Executive Yuan and Its Subordinate Agencies（行政院暨所屬各行政機關訴願審議委員會審議規則第十三條第一項）; Article 5-I (ii) of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第五條第一項第二款）.

KEYWORDS:

Litigation（爭訟）, right to take public examinations and to hold public offices（應考試服公職權）, necessity of protection of rights（權利保護必要）, litigated benefit（爭訟利益）, administrative litigation（行政爭訟）, recurrent right or legal interest（重複發生之權利或法律上利益）.**

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* Translated by Vincent C. Kuan.

** Contents within frame, not part of the original text, are added for reference purpose only.

HOLDING: J. Y. Yuan-Tze No. 2810 provides, "In respect of the medical checkup or capability evaluation conducted to determine a person's eligibility for taking an examination held pursuant to the Examination Act, a decision stating to the effect that an examinee failed the checkup or evaluation is no doubt an administrative action. If the disposition is either illegal or improper, the examinee may file an administrative appeal according to Article 1 of the Administrative Appeal Act. Nonetheless, if the disposition has become irremediable by the time the decision is made, the administrative appeal should not be accepted and thus should be dismissed pursuant to Article 7 of the Administrative Appeal Act since there is no substantive benefit for the administrative appeal." The foregoing interpretation is meant to explain that, in filing an administrative litigation, some necessity of protection of the right involved should exist. In other words, it should be premised on the existence of litigated benefit. If the infringed rights or legal interests of the litigant are irreparable or the legal status or other interests of the litigant

解釋文：本院院字第二八一〇號解釋：「依考試法舉行之考試，對於應考資格體格試驗，或檢覈經決定不及格者，此項決定，自屬行政處分。其處分違法或不當者，依訴願法第一條之規定，應考人得提起訴願。惟為訴願決定時，已屬無法補救者，其訴願為無實益，應不受理，依訴願法第七條應予駁回。」旨在闡釋提起行政爭訟，須其爭訟有權利保護必要，即具有爭訟之利益為前提，倘對於當事人被侵害之權利或法律上利益，縱經審議或審判之結果，亦無從補救，或無法回復其法律上之地位或其他利益者，即無進行爭訟而為實質審查之實益。惟所謂被侵害之權利或利益，經審議或審判結果，無從補救或無法回復者，並不包括依國家制度設計，性質上屬於重複發生之權利或法律上利益，人民因參與或分享，得反覆行使之情形。是人民申請為公職人員選舉候選人時，因主管機關認其資格與規定不合，而予以核駁，申請人不服提起行政爭訟，雖選舉已辦理完畢，但人民之被選舉權，既為憲法所保障，且性質上得反覆行使，若該項選舉制度繼續存在，則審議或審判結果對其參與另次選舉成為候選人資格之權利仍具實益者，並非無權利保護必要者可比，此類訴訟

are unrecoverable regardless of the outcome of a review or a trial, then there is no substantive benefit in proceeding with the litigation and/or conducting a substantive review. However, the so-called irreparability or unrecoverability of infringed rights or interests despite the outcome of a review or a trial does not include such circumstances as the repetitive exercise of a recurrent right or legal interest by the people due to participation in or enjoyment of a system designed by the state. Thus, where the competent authority disapproves a citizen's application for candidacy for public office because such authority decided that he or she is not qualified, the applicant may initiate an administrative litigation against such decision. Although the election has already been held, the outcome of a review or a trial will still produce substantive benefit for the applicant who may participate in another election and become a candidate for public office as long as that particular election system still exists. Thus, the people's right to be elected is not only constitutionally protected but, in nature, can be exercised repeatedly. The aforesaid situa-

相關法院自應予以受理，本院上開解釋，應予補充。

tion varies substantially from such circumstances where there is no necessity of protection of rights. Therefore, the competent courts shall still hear such lawsuits. Supplemental opinions are thus given by this Court in respect of the interpretation at issue.

REASONING: Under the Constitution, the people have the right to right to take public examinations and to hold public office. The right to take public examinations refers to the right of those people who possess certain qualifications to register for state-administered examinations aimed at selecting and appointing public servants and for examinations admitting professionals and technical personnel. On the other hand, the right to hold public office refers to the right of the people to assume various offices by law or through elections, thereby contributing to public service. If any citizen claims that the public authority has infringed upon any of his or her rights mentioned above, he or she should be allowed to file a lawsuit before a court of law, which will deliberate and decide the case pursuant to

解釋理由書：人民依憲法規定有應考試、服公職之權。其中應考試之權，係指具備一定資格之人民有報考國家所舉辦公務人員任用資格暨專門職業及技術人員執業資格考試之權利；服公職之權，則指人民享有擔任依法進用或選舉產生之各種公職、貢獻能力服務公眾之權利。人民倘主張上開權利遭受公權力之侵害，自應許其提起爭訟，由法院依法審判，方符有權利即有救濟之法理。

law. Only then will the legal principle be realized, which states, “Where there is a right, there is a remedy.”

J. Y. Yuan-Tze No. 2810 provides, “In respect of the medical checkup or capability evaluation conducted to determine a person’s eligibility for taking an examination held pursuant to the Examination Act, a decision stating to the effect that an examinee failed the checkup or evaluation is no doubt an administrative action. If the disposition is either illegal or improper, the examinee may file an administrative appeal according to Article 1 of the Administrative Appeal Act. Nonetheless, if the disposition has become irremediable by the time the decision is made, the administrative appeal should not be accepted and thus should be dismissed pursuant to Article 7 of the Administrative Appeal Act since there is no substantive benefit for the administrative appeal.” The foregoing interpretation is meant to explain that, in filing an administrative litigation, some necessity of protection of the right involved should exist. In other words, it should be premised on

本院院字第二八一〇號解釋：「依考試法舉行之考試，對於應考資格體格試驗，或檢覈經決定不及格者，此項決定，自屬行政處分。其處分違法或不當者，依訴願法第一條之規定，應考人得提起訴願。惟為訴願決定時，已屬無法補救者，其訴願為無實益，應不受理，依訴願法第七條應予駁回。」旨在闡釋提起行政爭訟，須其爭訟有權利保護必要，即具有爭訟之利益為前提，倘對於當事人被侵害之權利或法律上利益，縱經審議或審判結果，亦無從補救，或無法回復其法律上之地位或其他利益者，即無進行爭訟而為實質審查之實益。惟所謂被侵害之權利或利益，經審議或審判結果，無從補救或無法回復者，並不包括依國家制度設計，性質上屬於重複發生之權利或法律上利益，諸如參加選舉、考試等，人民因參與或分享，得反覆行使之情形。是當事人所提出之爭訟事件，縱因時間之經過，無從回復權利被侵害前之狀態，然基於合理之期待，未來仍有同類情事發生之可能時，即非無權利保護必要，自應予以救

the existence of litigated benefit. If the infringed rights or legal interests of the litigant are irreparable or the legal status or other interests of the litigant are unrecoverable regardless of the outcome of a review or a trial, then there is no substantive benefit in proceeding with the litigation and/or conducting a substantive review. However, the so-called irreparability or unrecoverability of infringed rights or interests despite the outcome of a review or a trial does not include such circumstances as the repetitive exercise of a recurrent right or legal interest by the people due to participation in or enjoyment of a system designed by the state. Therefore, even if the infringed right could not be restored to the *status quo ante* due to the passage of time despite the lawsuit brought by the litigant, similar events are still likely to occur in the future in light of the reasonable expectation, thus giving rise to the necessity of protection of the rights. Remedies should be made available to the litigant so as to safeguard his or her rights and interests. Where the competent authority disapproves a citizen's application for candidacy for public

濟，以保障其權益。人民申請為公職人員選舉候選人，因主管機關認其資格與規定不合而予核駁處分，申請人不服而提起行政爭訟時，雖選舉已辦理完畢，但其經由選舉而擔任公職乃憲法所保障之權利，且性質上得反覆行使，除非該項選舉已不復存在，則審議或審判結果對其參與另次選舉成為候選人資格之權利仍具實益，並非無權利保護必要者可比。受理爭訟之該管機關或法院，仍應為實質審查，若原處分對申請人參選資格認定有違法或不當情事，應撤銷原處分或訴願決定，俾其後申請為同類選舉時，不致再遭核駁處分。

office because such authority decided that he or she is not qualified, the applicant may initiate an administrative litigation against such decision. Although the election has already been held, the outcome of a review or a trial will still produce substantive benefit for the applicant who may participate in another election and become a candidate for public office unless that particular election system no longer exists. Thus, the people's right to be elected is not only constitutionally protected but, in nature, can be exercised repeatedly. The aforesaid situation varies substantially from such circumstances where there is no necessity of protection of rights. The competent courts accepting such cases shall still conduct substantive review of the cases. If the original disposition, in disqualifying the applicants, is either illegal or improper, the original disposition or administrative appeal decision shall be revoked so that subsequent applications filed for elections of similar type will no longer be disapproved.

Additionally, in respect of the petitioner's contention that the provisions of

至本件聲請人認公職人員選舉罷免法第三十五條第一項第二款規定，以

Article 35-I (ii) of the Public Officials Election and Recall Act, as well as Article 13-I of the Regulation Governing the Deliberation and Review of Administrative Appeals by the Administrative Appeal Review Committees of the Executive Yuan and Its Subordinate Agencies are in violation of the Constitution, this Court dismisses said petition according to Article 5-I (ii) of the Constitutional Interpretation Procedure Act because the said provisions are not the statute or regulation relied upon by the court of last resort in its final judgment.

及行政院暨所屬各行政機關訴願審議委員會審議規則第十三條第一項規定，有違憲疑義部分，因非確定終局裁判所適用之法令，依司法院大法官審理案件法第五條第一項第二款規定，應不予受理，併此指明。

J. Y. Interpretation No.547（June 28, 2002）*

ISSUE: 1. Does Article 10 of the Chinese Herbal Doctor Certification Regulation requiring an overseas Chinese herbal doctor who has obtained the overseas Chinese herbal doctor examination certificate for passing the Chinese herbal doctor examination to take the make-up written examination instead of the interview when he or she returns to Taiwan to practice violate the work right guaranteed by Article 15 of the Constitution?

2. Does Article 10 of the Chinese Herbal Doctor Certification Regulation exceed the scope of authorization granted by the Physician Act and the Specialist and Technician Examination Act by imposing additional restrictions prohibited under the Physician Act and the Specialist and Technician Examination Act, thus violating the equal protection principle under the Constitution?

RELEVANT LAWS:

Articles 7,15, 23 and 86, Subparagraph 2, of the Constitution（憲法第七條、第十五條、第二十三條及第八十六條第二款）; J. Y. Interpretation No. 485（司法院釋字第四八五號解釋）; Article 13 of the Standard Act for the Laws and Rules（中央法規標準法第十三條）; Articles 1 and 3, Paragraph 4 of the Physician Act（醫師法第一條、第三條第四項）; Ar-

* Translated by Li-Chih Lin, Esq., J.D.

** Contents within frame, not part of the original text, are added for reference purpose only.

ticles 1 and 5 of the Specialist and Technician Examination Act（專門職業及技術人員考試法第一條、第五條）; Article 2, Subparagraphs 3 and 4, of the Enforcement Rules of the Specialist and Technician Examination Act（專門職業及技術人員考試法施行細則第二條第三款、第四款）; Articles 2, Subparagraph 3, 6, 8 and 10 of the Chinese Herbal Doctor Certification Regulation（中醫師檢覈辦法第二條第三款、第六條、第八條及第十條）; Article 4, Paragraphs 1 and 2 of the Specialist and Technician Interview and On-Site Examination Certification Regulation（專門職業及技術人員檢覈面試及實地考試辦法第四條第一項、第二項）.

KEYWORDS:

specialist（專門職業人員）, medical examination（醫師考試）, medical license（醫師證書）, qualification requirements（應考資格）, Chinese herbal doctor（中醫師）, certification（檢覈）, overseas Chinese（華僑）, overseas Chinese herbal doctor's examination certificate（華僑中醫師考試證明書）, overseas Chinese herbal doctor's license（華僑中醫師考試及格證書）, equal protection principle（平等保護原則）, interview（面試）, on-site examination（實地考試）, written examination（筆試）, reliance interests（信賴利益）.**

HOLDING: Article 86, Subparagraph 2, of the Constitution provides that a specialist or a technician who wants to

解釋文：憲法第八十六條第二款規定，專門職業及技術人員執業資格，應經考試院依法考選銓定之。醫師

practice his or her profession should obtain a license by passing the examination held by the Examination Yuan in accordance with the applicable law. Because physicians providing medical care affect not only the personal rights and interests of the patient but also affect the public interests in the health of the nationals, physicians should possess specialized medical knowledge and skills. Since physicians are medical specialists, they should obtain their medical licenses by passing the medical examination held by the Examination Yuan in accordance with the applicable law. Promulgated on September 22, 1943, Article 1 of the Physician Act provides that a citizen of the Republic of China may become a physician by passing the medical examination. (This Article was amended on July 29, 1992, to provide that a citizen of the Republic of China may become a physician by passing the medical examination and obtaining a medical license in accordance with the same Act.) Physicians should be tested on their specialized medical knowledge and skills. The material items such as the qualification requirements for taking the

從事醫療行為，不僅涉及病患個人之權益，更影響國民健康之公共利益，自須具備專門之醫學知識與技能，醫師既屬專門職業人員，其執業資格即應按首開規定取得。中華民國三十二年九月二十二日公布之醫師法第一條明定：「中華民國人民經醫師考試及格者，得充醫師」（八十一年七月二十九日修正為：「中華民國人民經醫師考試及格並依本法領有醫師證書者，得充醫師」）。第醫師應如何考試，涉及醫學上之專門知識，醫師法已就應考資格等重要事項予以規定，其屬細節性與技術性事項，自得授權考試機關及業務主管機關發布命令為之補充。關於中醫師考試，醫師法對其應考資格已定有明文，至於中醫師檢覈之科目、方法、程序等事項，則授權考試院會同行政院依其專業考量及斟酌中醫之傳統醫學特性，訂定中醫師檢覈辦法以資規範，符合醫師法與專門職業及技術人員考試法之意旨，與授權明確性原則無違。

medical examination have been prescribed in the Physician Act. The Physician Act has authorized the examination agency and the competent authority to enact supplementary regulations governing the detailed and technical matters of the medical examination. The qualification requirements of the medical examination for Chinese herbal doctor have also been specifically prescribed in the Physician Act. As for the examination subjects, methods, and procedures, the Examination Yuan and the Executive Yuan have been authorized to enact the Chinese Herbal Doctor Certification Regulation taking into consideration the specialty and the characteristics of traditional Chinese medicine. The Chinese Herbal Doctor Certification Regulation is consistent with the legislative intent of the Physician Act and the Specialist and Technician Examination Act, and is within the scope of the authorization granted to the Examination Yuan and the Executive Yuan.

As amended on August 31, 1982, by the Examination Yuan and the Executive Yuan, Article 8, Paragraph 1, of the Chi-

考試院會同行政院於七十一年八月三十一日修正發布之中醫師檢覈辦法第八條第一項規定：「中醫師檢覈除審

nese Herbal Doctor Certification Regulation states: “To qualify as a certified Chinese herbal doctor, the applicant must provide his or her credentials for review, and take the required interview or the on-site examination. But applicants who apply for the certification as a distinguished Chinese herbal doctor having been in practice for more than 5 years under Article 2, Subparagraph 3, of the said Regulation shall be given an interview. Article 2, Paragraph 2, of the said Regulation also provides that an overseas Chinese who is granted the interview after applying for the certification under the forgoing provision shall take the make-up written examination when he or she returns to Taiwan to practice. To coordinate with the Specialist and Technician Examination Act promulgated on January 24, 1986, a new version of the Chinese Herbal Doctor Certification Regulation was subsequently enacted and promulgated on August 22, 1988, by the Examination Yuan and the Executive Yuan. Article 6 of the said Regulation provides that an applicant who applies for the certification will be given a written examination. Article 10 of the said

查證件外，得舉行面試或實地考試。但以第二條第三款之資格應檢覈者，一律予以面試」，同條第二項又規定：「華僑聲請中醫師檢覈依前項規定應予面試者，回國執業時應行補試」。嗣因配合七十五年一月二十四日專門職業及技術人員考試法之公布，考試院乃重新訂定，於七十七年八月二十二日會同行政院發布中醫師檢覈辦法，其第六條規定申請中醫師檢覈者，予以筆試，並於第十條規定：「已持有『僑』字中醫師考試及格證書者，回國執業時，仍應依照第六條之規定補行筆試」。此一規定，依法律整體規定之關聯意義為綜合判斷，僅屬專門職業及技術人員考試法暨醫師法所授權訂定之中醫師檢覈辦法中關於考試技術之變更，並不影響華僑依中醫師檢覈辦法所已取得「僑」字中醫師及格證書及「僑中」字中醫師證書之效力，更無逾越前開法律授權之範圍或增加母法所無之限制，與憲法保障人民權利之意旨並無違背。

Regulation also provides that an overseas Chinese who has obtained the overseas Chinese herbal doctor examination certificate for passing the Chinese herbal doctor examination, shall take the make-up written examination instead of the interview in accordance with Article 6 of the said Regulation when he or she returns to Taiwan to practice. In considering the totality of the relevant laws, the provision set forth in Article 10 of the said Regulation is merely a modification of the examination method prescribed in the said Regulation enacted by the Examination Yuan and the Executive Yuan under the authorization of the Physician Act and the Specialist and Technician Examination Act. The provision neither affects the validity of the overseas Chinese herbal doctor examination certificate and the overseas Chinese herbal doctor's license nor exceeds the scope of authorization granted to the Examination Yuan and the Executive Yuan. The provision does not impose additional restrictions prohibited under the Physician Act and the Specialist and Technician Examination Act and is consistent with the legislative intent of the

Constitution in protecting the rights and interests of the people.

In addition, the equal protection principle under the Constitution means equality in substance. In considering the necessity of the circumstances and the purpose of the certification, the examination agency and the competent authority may impose proper restrictions on relevant matters in accordance with the applicable law. Those overseas Chinese who apply for the Chinese herbal doctor certification but are not present for the interview held by the Examination Yuan in Taiwan will be able to obtain the overseas Chinese herbal doctor's examination certificate and the overseas Chinese herbal doctor's license if their credentials are approved upon review. The granting of the overseas Chinese herbal doctor examination certificate or the overseas Chinese herbal doctor's license is an administrative act in nature. The validity of such certificate or license is subject to some jurisdictional limitations. Those overseas Chinese herbal doctors who do not take the interview or the written examination

次按憲法上所謂平等原則，係指實質上之平等而言，若為因應事實上之需要及舉辦考試之目的，就有關事項，依法自得酌為適當之限制。華僑申請中醫師檢覈，其未回國參加面試者，於審查證件合格後，即發給「僑」字中醫師考試及格證書及「僑中」字中醫師證書，此種證書之發給性質上為具體行政行為，惟其適用地之效力受到限制。其既未依中醫師檢覈辦法回國參加面試或筆試，即不得主張取得與參加面試或筆試及格者所得享有在國內執行中醫師業務之權利，否則反而造成得以規避面試或筆試而取得回國執行中醫師業務之資格，導致實質上之不平等。是上開中醫師檢覈辦法將中醫師檢覈分成兩種類別而異其規定，並未違背憲法平等原則及本院歷來解釋之旨意。又「面試」包括一、筆試，二、筆試及口試，是考試之方法雖有面試、筆試、口試等之區別，但無非均為拔擢人才、銓定資格之方式，苟能在執行上力求客觀公平，並不影響當事人之權益或法律上地位，其領有「僑中」字中醫師證書者，本未取得在國內執業之資格，尚無值得保護之信

held by the Examination Yuan in Taiwan in compliance with the said Regulation may not claim that they have the rights to practice as certified Chinese herbal doctors in Taiwan like other applicants who take and pass the interview or the written examination. If an overseas Chinese herbal doctor were able to practice in Taiwan as a certified Chinese herbal doctor without taking and passing the required interview or the written examination, there would be a substantive inequality. Therefore, by providing two separate categories of rules in governing the overseas Chinese applicants and domestic applicants, the Chinese Herbal Doctor Certification Regulation do not violate the equal protection principle under the Constitution and are consistent with the prior Interpretations of this Yuan. In addition, the "interview" required by the Chinese Herbal Doctor Certification Regulation includes: (1) the written examination, or (2) the written or oral examination. While there are three different types of examination including the interview, written examination, and oral examination, these examinations are all effective methods for

賴利益可言。則前開辦法重新訂定發布後，即依中央法規標準法第十三條規定，自發布日起算至第三日起發生效力而無過渡期間之規定，並無違背信賴保護原則。至九十一年一月十六日修正之醫師法第三條第四項：「已領有僑中字中醫師證書者，應於中華民國九十四年十二月三十一日前經中醫師檢覈筆試及格，取得臺中字中醫師證書，始得回國執業」，亦係為配合八十八年十二月二十九日修正公布之專門職業及技術人員考試法已廢止檢覈制度所為之過渡規定，對其依法所已取得之權利，並無影響，與憲法保障人民權利之意旨亦無違背，併此指明。

choosing the most qualified Chinese herbal doctors. The administration of these examinations will be reasonably objective and fair, and will neither deprive the applicants of their rights or interests nor adversely affect the standing of the applicants under the law. For those overseas Chinese who obtain the overseas Chinese herbal doctor's certificate without taking or passing the interview or the written examination in Taiwan, their reliance interests are not protected under the law because they are not qualified to practice in Taiwan as certified Chinese herbal doctors. Thus, the new version of the Chinese Herbal Doctor Certification Regulation, effective on the third day of the promulgation pursuant to Article 13 of the Standard Act for the Laws and Rules, does not violate the reliance interests principle. Article 3, Paragraph 4, of the Physician Act, as amended on January 16, 2002, provides that an overseas Chinese who has been granted the overseas Chinese herbal doctor's license, should obtain the Taiwan Chinese herbal doctor's license by passing the Chinese herbal doctor examination held by the Examination

Yuan in Taiwan no later than January, 1, 2005, before he or she returns to Taiwan to practice. The forgoing provision is amended as a transitional regulation to coordinate with the Specialist and Technician Examination Act amended on December 29, 1999, for the purpose of abolishing the certification system. The amended provision creates no restriction on the rights and interests already obtained by the overseas Chinese herbal doctors under the applicable law and the provision is also consistent with the legislative intent of the Constitution in protecting the rights and interests of the people.

REASONING: Article 86, Subparagraph 2, of the Constitution provides that a specialist or a technician who wants to practice his or her profession should obtain a license by passing the examination held by the Examination Yuan in accordance with the applicable law. Because physicians providing medical care affect not only the personal rights and interests of the patient but also affect the public interests in the health of the nationals, physicians should possess specialized

解釋理由書：憲法第八十六條第二款規定，專門職業及技術人員執業資格，應經考試院依法考選銓定之。醫師從事醫療行為，不僅涉及病患個人之權益，更影響國民健康之公共利益，自須具備專門之醫學知識與技能，醫師既屬專門職業人員（七十五年五月二日發布之專門職業及技術人員考試法施行細則第二條第三、四款規定參照，現行法第二條第三、四款規定亦同），其執業資格即應按首開規定取得。三十二年九月二十二日公布之醫師法第一條明定：

medical knowledge and skills. Since physicians are medical specialists (See Article 2, Subparagraphs 3 and 4, of the Specialist and Technician Examination Act, promulgated on My 2, 1986; the same as Article 2, Subparagraphs 3 and 4, of said Act), they should obtain their medical licenses by passing the medical examination held by the Examination Yuan in accordance with the applicable law. Promulgated on September 22, 1943, Article 1 of the Physician Act provides that a citizen of the Republic of China may become a physician by passing the medical examination. (This Article was amended on July 29, 1992, to provide that a citizen of the Republic of China may become a physician by passing the medical examination and obtaining a medical license in accordance with this Act.) Physicians should be tested on their specialized medical knowledge and skills. The material items such as the qualification requirements for taking the medical examination have been prescribed in the Physician Act. Said Act has authorized the examination agency and the competent authority to enact supplementary regulations governing the de-

「中華民國人民經醫師考試及格者，得充醫師」（八十一年七月二十九日修正為：「中華民國人民經醫師考試及格並依本法領有醫師證書者，得充醫師」）。第醫師應如何考試，涉及醫學上之專門知識，醫師法已就應考資格等重要事項予以規定，其屬細節性與技術性事項，自得授權考試機關及業務主管機關發布命令為之補充。關於中醫師考試，醫師法對其應考資格已定有明文，至於中醫師檢覈之科目、方法、程序等事項，則授權考試院會同行政院依其專業考量及斟酌中醫之傳統醫學特性，訂定中醫師檢覈辦法以資規範，符合醫師法與專門職業及技術人員考試法之意旨，與授權明確性原則無違。

tailed and technical matters of the medical examination. The qualification requirements of the medical examination for Chinese herbal doctor have also been specifically prescribed in said Act. As for the examination subjects, methods, and procedures, the Examination Yuan and the Executive Yuan have been authorized to enact the Chinese Herbal Doctor Certification Regulation taking into consideration the specialty and the characteristics of traditional Chinese medicine. The Chinese Herbal Doctor Certification Regulation is consistent with the legislative intent of the Physician Act and the Specialist and Technician Examination Act, and is within the scope of the authorization granted to the Examination Yuan and the Executive Yuan.

As amended on August 31, 1982, by the Examination Yuan and the Executive Yuan, Article 8, Paragraph 1, of the Chinese Herbal Doctor Certification Regulation states: “To qualify as a certified Chinese herbal doctor, the applicant must provide his or her credentials for review, and take the required interview or on-site

考試院會同行政院於七十一年八月三十一日修正發布之中醫師檢覈辦法第八條第一項規定：「中醫師檢覈除審查證件外，得舉行面試或實地考試。但以第二條第三款之資格（曾執行中醫業務五年以上卓著聲望者）應檢覈者，一律予以面試」，同條第二項又規定「華僑聲請中醫師檢覈依前項規定應予面試

examination. But applicants who apply for the certification as a distinguished Chinese herbal doctor having practiced for more than 5 years, under Article 2, Subparagraph 3, of the said Regulation shall be given an interview. Paragraph 2, of said Article also provides that an overseas Chinese who is granted the interview after applying for the certification under the forgoing provision shall take the make-up interview when he or she returns to Taiwan to practice. The purpose of the government in enacting the forgoing provision at that time to allow an overseas Chinese applying for the certification to take the make-up interview when he or she returned to Taiwan to practice was to provide an opportunity for the overseas Chinese. For those overseas Chinese who apply for the overseas Chinese herbal doctor certification but are not present for the interview held by the Examination Yuan in Taiwan, they will be able to obtain the overseas Chinese herbal doctor examination certificate and the overseas Chinese herbal doctor's license if their credentials are approved upon review. The granting of the overseas Chinese herbal doctor's

者，回國執業時應行補試」。其所以規定華僑申請中醫師檢覈依規定應予面試，回國執業時，應行補試者，乃係政府當年為照顧華僑，對於華僑申請中醫師檢覈，其未回國參加面試者，僅採書面審查證件方式為之，即發給「僑」字中醫師考試及格證書及「僑中」字中醫師證書，此種證書之發給性質上為具體行政行為，惟其適用地之效力受到限制。故為與其他經由面試及格而取得中醫師資格者有所區分，暨為防止取得「僑中」字之中醫師以規避面試之方法，達到回國執行中醫師業務，造成對在國內參加中醫師檢覈，必須經由面試及格始能取得中醫師資格之不公平現象以及為提昇中醫師素質，確保中醫師之醫療品質，乃於該辦法中明定華僑申請中醫師檢覈，依規定應予面試者，回國執業時，應行補試，並非得免除其補行面試，即可憑證件審查而當然取得回國執業之資格，此有考選部函覆本院九十年八月十六日選專字第〇九〇三三〇一八三四號函可據。又中醫師檢覈辦法中所稱面試，依考試院三十四年五月二十二日發布（四十六年十二月二十七日廢止）之中醫師檢覈面試辦法第五條規定：「面試分左列兩種：(一)筆試(二)口試或實地考試」，嗣考試院於四十六

examination certificate or the overseas Chinese herbal doctor's license is an administrative act in nature. The validity of such certificate or license is subject to some jurisdictional limitations. Such certificate or license is therefore distinguishable from that of other applicants who become certified Chinese herbal doctors by passing the interview. Since all domestic applicants can only obtain their certified Chinese herbal doctor status by passing the required interview, the provision was enacted to prevent inequality by prohibiting those overseas Chinese herbal doctors who have already obtained their overseas Chinese herbal doctor's examination certificate and the overseas Chinese herbal doctor's license from returning to Taiwan to practice without passing the required interview. To ensure the qualifications of Chinese herbal doctors and to safeguard the medical care provided by Chinese herbal doctors, the overseas Chinese herbal doctors cannot become certified Chinese herbal doctors by only submitting their credentials but are required in the forgoing provision to take the make-up interview in order to practice

年十二月二十七日發布（五十五年七月十一日及五十七年四月三十日先後修正）之專門職業及技術人員檢覈面試及實地考試辦法第四條第一項及第二項規定：「面試分左列兩種方式行之：一、筆試。二、筆試及口試」「實地考試方法與面試科目由考選部定之」。則所謂「面試」者，自始即非僅指「口試」之義。七十五年一月二十四日公布之專門職業及技術人員考試法，其第一條規定：「專門職業及技術人員之執業，依本法以考試定其資格」。第五條規定：「各種考試，得採筆試、口試、測驗、實地考試、審查著作或發明或所需知能有關學歷、經歷證件及論文等方式行之。除筆試外，其他應採二種以上方式……」（八十八年十二月二十九日修正改列第四條），已不採「面試」之用語。原專門職業及技術人員檢覈面試及實地考試辦法遂於七十五年七月一日明令廢止，同日訂定發布專門職業及技術人員檢覈筆試口試及實地考試辦法。為配合前開法規之修正，考試院乃重新於七十七年八月二十二日會同行政院發布中醫師檢覈辦法（八十二年三月十七日修正），其第六條規定申請中醫師檢覈者，予以筆試，並將原第八條第二項移至第十條規定：「已持有『僑』字中醫

in Taiwan. This is evident from the No. 0903301834 letter dated August 16, 2001, from the Department of Examination and Selection to the Judicial Yuan. Furthermore, the "interview" stated in Article 5 of the Chinese Herbal Doctor Interview Certification Regulation (promulgated on May 22, 1945, and abolished on December 27, 1957) included: (1) the written examination, or (2) the oral or on-site examination. Later, Article 4, Paragraph 1, of the Specialist and Technician Interview and On-Site Examination Certification Regulation (promulgated on December 27, 1957, and amended on July 11, 1966, and April 30, 1968, respectively, by the Examination Yuan) provided that the interview included: (1) the written examination, or (2) the written and oral examination. Article 4, Paragraph 2, of the said Regulation provides that the method of the on-site examination and the subjects of the interview will be decided by the Department of Examination and Selection. From the very beginning, the "interview" stated in the said Regulation included more than the oral examination. Promulgated on January 24, 1986, Article

師考試及格證書者，回國執業時，仍應依照第六條之規定補行筆試」。據此，則上開已持有「僑」字中醫師及格證書者，其回國執業時應行之補試方式雖由面試改為筆試，惟依法律整體規定之關聯意義為綜合判斷，僅屬專門職業及技術人員考試法暨醫師法所授權訂定之中醫師檢覈辦法中關於考試技術之變更而已，並不影響華僑依中醫師檢覈辦法所已取得「僑」字中醫師考試及格證書及「僑中」字中醫師證書之效力，更無逾越前開法律授權之範圍或增加母法所無之限制，與憲法保障人民權利之意旨並無違背。

1 of the Specialist and Technician Examination Act provides that a specialist or a technician who wants to practice his or her profession should obtain the qualification by passing the examination. Article 5 of the same Act provides that the examination required under this Act may take various forms such as the written examination, oral examination, test, on-site examination, review of a paper, review of an invention, review of the educational background, credentials or dissertations. Except for the written examination, the examination required under this Act shall combine two or more forms of examination. Thus the term "interview" was no longer used in the Specialist and Technician Examination Act. The original Specialist and Technician Interview and On-Site Examination Certification Regulation was abolished and replaced by the Specialist and Technician Written, Oral and On-Site Examination Certification Regulation on July 1, 1986. To coordinate with the amendment to the abovementioned provisions, a new version of the Chinese Herbal Doctor Certification Regulation was subsequently enacted and promul-

gated on August 22, 1988, by the Examination Yuan and the Executive Yuan. Article 6 of the said Regulation provides that an applicant who applies for the certification will be given a written examination. Article 10 of the said Regulation (Article 8, Paragraph 2, of the previous Chinese Herbal Doctor Certification Regulation) also provides that an overseas Chinese who has obtained the overseas Chinese herbal doctor's examination certificate for passing the Chinese herbal doctor examination, shall take the make-up written examination instead of the interview in accordance with Article 6 of the same Regulation when he or she returns to Taiwan to practice. In considering the totality of the relevant laws, the forgoing provision requiring an overseas Chinese herbal doctor to take the make-up written examination instead of the interview when he or she returns to Taiwan to practice is merely a modification of the examination method prescribed in the said Regulation enacted by the Examination Yuan and the Executive Yuan under the authorization of the Physician Act and the Specialist and Technician Examination Act. The provi-

sion neither affects the validity of the overseas Chinese herbal doctor's examination certificate and the overseas Chinese herbal doctor's license nor exceeds the scope of authorization granted to the Examination Yuan and the Executive Yuan. The provision does not impose additional restrictions prohibited under the Physician Act and the Specialist and Technician Examination Act and is consistent with the legislative intent of the Constitution in protecting the rights and interests of the people.

In addition, the equal protection principle under the Constitution does not mean absolutely or mechanically equal in formality. The equal protection principle protects the equality in substance by protecting the equal standing of people under the law. In considering the necessity of the circumstances and the purpose of the examination, the examination agency and the competent authority may create reasonable classifications among people based on their differences in nature (See No. 485 of the Judicial Interpretation). Those overseas Chinese who apply for the

次按憲法第七條平等原則並非絕對、機械之形式上平等，而係保障人民在法律上地位之實質平等，若為因應事實上之需要及舉辦考試之目的，訂立法規之機關自得斟酌規範事物性質之差異而為合理之區別對待（本院釋字第四八五號解釋參照）。華僑申請中醫師檢覈，其未回國參加面試者，於審查證件合格後，即發給「僑」字中醫師考試及格證書及「僑中」字中醫師證書，其既未於七十七年八月二十二日中醫師檢覈辦法修法前回國參加面試，或於修法後參加筆試，即不得主張取得與參加面試或筆試及格者所得享有在國內執行中醫

Chinese herbal doctor certification but are not present for the interview held by the Examination Yuan in Taiwan will be able to obtain the overseas Chinese herbal doctor's examination certificate and the overseas Chinese herbal doctor's license if their credentials are approved upon review. If those overseas Chinese did not take the interview before the new version of the Chinese Herbal Doctor Certification Regulation was promulgated or did not take the written examination after the new version of the said Regulation was promulgated, they may not claim that they have the right to practice as certified Chinese herbal doctors in Taiwan like other applicants who take and pass the interview or the written examination. If an overseas Chinese herbal doctor were able to practice in Taiwan as a certified Chinese herbal doctor without taking and passing the required interview or the written examination, there would be a substantive inequality. Thus, by providing two separate categories of rules in governing the overseas Chinese applicants and domestic applicants, the said Regulation achieves the goal of choosing the most

師業務之權利，否則反而造成得以規避面試或筆試而取得回國執行中醫師業務之資格，導致實質上之不平等。是上開辦法以申請檢覈者是否具備特定身分作為區別對待之依據，符合公平取才之考銓目的，並未違背憲法平等原則及本院歷來解釋之旨意。又「面試」，原即包括一、筆試，二、筆試及口試等方式，是考試之方法雖有面試、筆試、口試等之區別，但無非均為拔擢人才、銓定資格之方式，苟能在執行上力求客觀公平，並不影響當事人之權益或法律上地位，其領有「僑中」字中醫師證書者，本未取得在國內執業之資格，尚無值得保護之信賴利益可言。則前開辦法重新訂定發布後，即依中央法規標準法第十三條規定，自發布日起算至第三日起發生效力而無過渡期間之規定，並無違背信賴保護原則。至九十一年一月十六日修正之醫師法第三條第四項：「已領有僑中字中醫師證書者，應於中華民國九十四年十二月三十一日前經中醫師檢覈筆試及格，取得臺中字中醫師證書，始得回國執業」，亦係為配合八十八年十二月二十九日修正公布之專門職業及技術人員考試法已廢止檢覈制度所為之過渡規定，對其依法所已取得之權利，並無影響，與憲法保障人民權利之意旨亦

qualified Chinese herbal doctors through a reasonably fair and objective method. The said Regulation therefore does not violate the equal protection principle under the Constitution and are consistent with the prior Interpretations of this Yuan. In addition, the "interview" required by the Chinese Herbal Doctor Certification Regulation includes: (1) the written examination, or (2) the written or oral examination. While there are three different types of examination including the interview, written examination, and oral examination, these examinations are all effective methods to choose the most qualified Chinese herbal doctors. The administration of these examinations will be reasonably objective and fair, and will neither deprive the rights and interests of the applicants nor adversely affect the standing of the applicants under the law. For those overseas Chinese who obtain the overseas Chinese herbal doctor's certificate without taking or passing the interview or the written examination in Taiwan, their reliance interests are not protected under the law because they are not qualified to practice in Taiwan as certified Chinese herbal

無違背，併此指明。

doctors. Thus, the new version of the Chinese Herbal Doctor Certification Regulation, effective on the third day of the promulgation pursuant to Article 13 of the Standard Act for the Laws and Rules does not violate the reliance interests principle. Article 3, Paragraph 4, of the Physician Act, as amended on January 16, 2002, provides that an overseas Chinese who has been granted the overseas Chinese herbal doctor's license, should obtain the Taiwan Chinese herbal doctor's license by passing the Chinese herbal doctor examination held by the Examination Yuan in Taiwan no later than January, 1, 2005, before he or she returns to Taiwan to practice. The forgoing provision is amended as a transitional regulation to coordinate with the Specialist and Technician Examination Act amended on December 29, 1999, for the purpose of abolishing the certification system. The amended provision creates no restriction on the rights and interests already obtained by the overseas Chinese herbal doctors under the applicable law and the provision is also consistent with the legislative intent of the Constitution in protecting the rights and

interests of the people.

Justice Yueh-Chin Hwang filed concurring opinion and dissenting opinion in part.

本號解釋黃大法官越欽提出協同及一部不同意見書。

J. Y. Interpretation No.548（July 12, 2002）*

ISSUE: Are the Guidelines for the Review of Cases Involving Enterprises Issuing Warning Letters for the Infringement of Copyright, Trademark, and Patent Rights, issued by the Fair Trade Commission under Article 45 of the Fair Trade Act, a restraining the people from exercising their rights, and thus in conflict with the principle of legal reservation?

RELEVANT LAWS:

J. Y. Interpretation No. 407（司法院釋字第四〇七號解釋）; Articles 19, 21, 22, 24 and 45 of the Fair Trade Act（公平交易法第十九條、第二十一條、第二十二條、第二十四條及第四十五條）; Article 88 of the Patent Act（專利法第八十八條）; Article 159 of the Administrative Procedure Act（行政程序法第一百五十九條）; Items 3 and 4 of the Guidelines for the Review of Cases Involving Enterprises Issuing Warning Letters for the Infringement of Copyright, Trademark, and Patent Rights（審理事業發侵害著作權、商標權或專利權警告函案件處理原則第三點、第四點）.

KEYWORDS:

conducts of unfair competition（不公平競爭行為）, infringement（侵害）, intellectual property right（智慧財產權）, warning letter（警告函）, patent（專利）, principle of legal reservation *(gesetzesvorbehalt)*（法律保留原則）, trademark（商標）.**

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* Translated by Wei-Feng Huang of THY Taiwan International Law Offices.

** Contents within frame, not part of the original text, are added for reference purpose only.

HOLDING: When enforcing provisions of certain laws in the execution of its duty, the competent authority may provide explanations that are necessary for the execution of duty by the said authority or public employees of its subordinate. The foregoing has been explicitly stated in this Yuan's Interpretation No.407. The "Guidelines for the Review of Cases Involving Enterprises Issuing Warning Letters for the Infringement of Copyright, Trademark, and Patent Rights," issued by the Fair Trade Commission of the Executive Yuan through Letter (86) Kung Fa Tze No. 01672 of May 14, 1997, are explanatory administrative rules issued by the Commission under Article 45 of the Fair Trade Act. The Guidelines assist the Commission in deciding whether the conduct of enterprises, in issuing warning letters to others for the infringement of intellectual property rights, constitutes abuse of their rights, thus conducive to the conduct of unfair competition prohibited by the Fair Trade Act, Articles 19, 21, 22, and 24 and the like. Items 3 and 4 of the said Guidelines state that the issuing of warning let-

解釋文：主管機關基於職權因執行特定法律之規定，得為必要之釋示，以供本機關或下級機關所屬公務員行使職權時之依據，業經本院釋字第四〇七號解釋在案。行政院公平交易委員會中華民國八十六年五月十四日（八六）公法字第〇一六七二號函發布之「審理事業發侵害著作權、商標權或專利權警告函案件處理原則」，係該會本於公平交易法第四十五條規定所為之解釋性行政規則，用以處理事業對他人散發侵害智慧財產權警告函之行為，有無濫用權利，致生公平交易法第十九條、第二十一條、第二十二條、第二十四條等規定所禁止之不公平競爭行為。前揭處理原則第三點、第四點規定，事業對他人散發侵害各類智慧財產權警告函時，倘已取得法院一審判決或公正客觀鑑定機構鑑定報告，並事先通知可能侵害該事業權利之製造商等人，請求其排除侵害，形式上即視為權利之正當行使，認定其不違公平交易法之規定；其未附法院判決或前開侵害鑑定報告之警告函者，若已據實敘明各類智慧財產權明確內容、範圍及受侵害之具體事實，且無公平交易法各項禁止規定之違反情事，亦屬權利之正當行使。事業對他人散發侵害專利權警告函之行為，雖係行

ters by enterprises to other people for infringement of various intellectual property rights shall be regarded, in formality, as the proper exercise of rights and does not breach the Fair Trade Act where, prior to such issue, the enterprises have obtained court judgment of the first instance or assessment reports furnished by professional infringement assessment institutions that are fair and objective, and have notified the potentially infringing parties such as manufacturers and others to request cessation of infringement and removal of the infringing articles. It is also a proper exercise of rights where the warning letters, though including no court judgment or the said assessment report, state explicitly the content and scope of the intellectual property in question and the facts surrounding their infringement, and do not come within the prohibitions set by the Fair Trade Act. Although the enterprises' issue of patent infringement warning letters is a right, to request the cessation and prevention of infringement, granted by Article 88 of the Patent Act, such right must not be abused. The foregoing is a fundamental principle of law, not something introduced

使專利法第八十八條所賦予之侵害排除與防止請求權，惟權利不得濫用，乃法律之基本原則，權利人應遵守之此項義務，並非前揭處理原則所增。該處理原則第三點、第四點係行政院公平交易委員會為審理事業對他人散發侵害智慧財產權警告函案件，是否符合公平交易法第四十五條行使權利之正當行為所為之例示性函釋，未對人民權利之行使增加法律所無之限制，於法律保留原則無違，亦不生授權是否明確問題，與憲法尚無牴觸。

by the said Guidelines, and the owners of such right shall observe such obligation. Items 3 and 4 of the said Guidelines are exemplary explanations provided by the Fair Trade Commission of the Executive Yuan in order to facilitate assessment of whether the enterprises' conduct, in issuing warning letters to others for infringement of intellectual property rights, is a proper exercise of their rights under Article 45 of the Fair Trade Act. The said Items add no restriction to the exercise of the people's rights that are new to the law, and do not conflict with the principle of legal reservation nor do they raise the question of authority. Thus, they are not in conflict with the Constitution.

REASONING: When enforcing provisions of certain laws in the execution of its duty, the competent authority may provide explanations that are necessary for the execution of duty by the said authority or public employees of its subordinate. The foregoing has been explicitly stated in this Yuan's Interpretation No.407 and is a form of administrative procedure stated in Article 159 of the Administrative

解釋理由書：主管機關基於職權因執行特定法律之規定，得為必要之釋示，以供本機關或下級機關所屬公務員行使職權時之依據，業經本院釋字第四〇七號解釋在案，此項釋示亦屬行政程序法第一百五十九條明定之行政規則之一種。公平交易法乃規範事業市場競爭行為之經濟法規，由於社會及經濟之變化演進，各式交易行為及限制競爭、妨礙公平競爭行為態樣亦隨之日新月

Procedure Act. The Fair Trade Act is a commercial legislation governing enterprises' competitive business practices. Due to the evolution of the society and economy, the forms of business transactions and unfair business practices have expanded, making it difficult to regulate explicitly each and every practice and conduct in detail. Therefore, legislators have adopted abstract legal concepts for the regulation of such, thus necessitating the competent authority to set explanatory administrative rules in order to guide them in the performance of their duty, clarification of facts and applicable laws.

異，勢難針對各類行為態樣一一規範。因此，立法者即在法律中以不確定之法律概念加以規定，而主管機關基於執行法律之職權，就此等概念，自得訂定必要之解釋性行政規則，以為行使職權、認定事實、適用法律之準據。

Article 45 of the Fair Trade Act stipulates: "No provision of this Act shall apply to any proper conduct in connection with the exercise of rights pursuant to the provisions of the Copyright Act, Trademark Act, or Patent Act." Its aim is to balance the conflict between the needs to protect intellectual property right owners and to maintain fair trade orders. Accordingly, when the competent authority is determining what "proper conduct in connection with the exercise of rights" is, it

公平交易法第四十五條規定：「依照著作權法、商標法或專利法行使權利之正當行為，不適用本法之規定。」係為調和智慧財產權人之保障與公平交易秩序之維護二者間所生之衝突。因此，主管機關基於職權認定何謂「行使權利之正當行為」，不但須考量智慧財產權人之利益，亦須顧及自由公平競爭環境之維護與社會公益之平衡。行政院公平交易委員會本於公平交易法第四十五條，於八十六年五月十四日以（八六）公法字第〇一六七二號函發布

must not only take into account the interests of intellectual property right owners, but also balance these interests with the need to maintain a fair and competitive environment and public interests. The Fair Trade Commission of the Executive Yuan issued the "Guidelines for the Review of Cases Involving Enterprises Issuing Warning Letters for the Infringement of Copyright, Trademark, and Patent Rights" under Article 45 of the Fair Trade Act, through Letter (86) Kung Fa Tze No.01672 of May 14, 1997, to determine whether the conduct of enterprises, in issuing warning letters to others for infringement of intellectual property, constitutes abuse of their rights, thus conducive to the conduct of unfair competition prohibited by the Fair Trade Act, Articles 19, 21, 22, and 24 and the like. Items 3 and 4 of the said Guidelines (amended by Letter (88) Kung Fa Tze No.03239 of November 9, 1999) state that the issuing of warning letters by enterprises to other people for infringement of various intellectual property rights shall be regarded, in formality, as the proper exercise of rights and does not breach the Fair Trade Act where, prior

之「審理事業發侵害著作權、商標權或專利權警告函案件處理原則」，用以判斷事業對他人散發侵害智慧財產權警告函之行為，有無濫用權利，致生公平交易法第十九條、第二十一條、第二十二條、第二十四條等規定所禁止之不公平競爭行為。前揭處理原則第三點、第四點規定（八十八年十一月九日以（八八）公法字第〇三二三九號函修正發布），事業對他人散發侵害各類智慧財產權警告函時，倘已取得法院一審判決或公正客觀鑑定機構鑑定報告，並事先通知可能侵害該事業權利之製造商等人，請求其排除侵害，形式上即視為權利之正當行使，認定其不違公平交易法之規定；其未附法院判決或前開侵害鑑定報告之警告函者，若已據實敘明各類智慧財產權明確內容、範圍及受侵害之具體事實，且無公平交易法各項禁止規定之違反情事，亦屬權利之正當行使，均係依職權對法律條文之不確定概念所作之合理詮釋。

to such issue, the enterprises have obtained court judgment of the first instance, or assessment reports furnished by professional infringement assessment institutions that are fair and objective, and have notified the potentially infringing parties, such as manufacturers and others, to request cessation of infringement and removal of the infringing articles. It is also a proper exercise of rights where the warning letters, though including no court judgment or the said assessment report, state explicitly the content and scope of the intellectual property in question and the facts surrounding their infringement, and do not come within the prohibitions set by the Fair Trade Act. The above are reasonable explanations for the abstract legal concepts as provided in the execution of duty.

Although the enterprises' issue of patent infringement warning letters is a right, to request the cessation and prevention of infringement, granted by Article 88 of the Patent Act, such right must not be abused. The foregoing is a fundamental principle of law, not something introduced

事業對他人散發侵害專利權警告函之行為，雖係行使專利法第八十八條所賦予之侵害排除與防止請求權，惟權利不得濫用，乃法律之基本原則，權利人應遵守之此項義務，並非前揭處理原則所增。如事業係為競爭之目的，濫用專利法所賦予之權利，任意對競爭者之

by the said Guidelines, and the owners of such right shall observe such obligation. If enterprises abuse the rights granted by the Patent Act for purposes of competition, and issue patent infringement warning letters to parties, or potential parties, dealing with their competitors, without cause, and without specifying the content and scope of the relevant patents and the facts surrounding the infringement, which create doubt and fear in the minds of the said parties in their attempt to avoid unnecessary lawsuits by purchasing the competitors' products or services, or which cause the said parties to refuse dealings with the competitors and lead to unfair competition, then they are not proper exercises of rights which are protected by the Patent Act; rather, they are competitive business practices to be regulated by the Fair Trade Act. The said Guidelines are exemplary explanations provided by the Fair Trade Commission of the Executive Yuan in order to facilitate assessment of whether the enterprises' conduct, in issuing warning letters to others for infringement of intellectual property, is the proper exercise of their rights under Article 45 of the

交易相對人或潛在交易相對人散發侵害專利權警告函，函中又未陳明專利權內容、範圍、及受侵害之具體事實，造成相對人收受警告函後，為避免因購買競爭者商品或服務而涉入無謂之訟累，心生疑懼，或拒與交易，形成不公平競爭，則非專利法所保障之權利正當行使，乃屬於公平交易法規範市場競爭行為之範疇。前揭處理原則係行政院公平交易委員會為審理事業對他人散發侵害智慧財產權警告函案件，是否符合公平交易法第四十五條行使權利之正當行為所為之例示性函釋，未對人民權利之行使增加法律所無之限制，於法律保留原則無違，亦不生授權是否明確問題，與憲法尚無牴觸。

Fair Trade Act. They add no restriction to the exercise of people's rights that are new to the law, and do not conflict with the principle of legal reservation, nor do they raise the question of authority. Thus, they are not in conflict with the Constitution.

J. Y. Interpretation No.549（August 2, 2002）*

ISSUE: Is the Labor Insurance Act constitutional in prescribing that the child adopted by the insured with the adoption to be recorded in the household registry in less than six months shall not be entitled to insurance payment upon said insured's death?

RELEVANT LAWS:

Articles 153 and 155 of the Constitution（憲法第一百五十三條、第一百五十五條）; Article 10, Paragraph 8, of the Amendment to the Constitution（憲法增修條文第十條第八項）; Article 1138 of the Civil Code（民法第一千一百三十八條）; Articles 15, 27, 63, 64, 65 and 66 of the Labor Insurance Act（勞工保險條例第十五條、第二十七條、第六十三條、第六十四條、第六十五條、第六十六條）; international labor conventions（國際勞工公約）.

KEYWORDS:

labor insurance（勞工保險）, social security（社會安全）, survivor's benefits（遺屬利益）, survivor allowance（遺屬津貼）.**

HOLDING: Labor insurance is a social security measure established to fulfill the fundamental national policies on

解釋文：勞工保險係國家為實現憲法第一百五十三條保護勞工及第一百五十五條、憲法增修條文第十條第八

* Translated by Professor Chin-Chin Cheng.

** Contents within frame, not part of the original text, are added for reference purpose only.

labor protection (regulated by Article 153 of the Constitution) and implementation of the social insurance system (regulated by Article 155 of the Constitution and Article 10, Paragraph 8, of the Amendment to the Constitution). The sources of the insurance fund are the premium paid by the insured, the subsidy provided by the government and the contribution disbursed by the employer. Therefore, the insurance fund is not the private property of the insured. The allowance that the survivor is entitled to claim when the insured dies is an income substitute and is purported to help the survivor avoid financial difficulties. The payment of the survivor allowance should therefore be based upon the survivor's need to be supported. The survivor allowance is also different from a lawful inheritance. Article 27 of the Labor Insurance Act provides that "The children adopted by the insured are not entitled to claim insurance benefits if the time between the registration of the adoption and the insurance peril is less than six months." The legislative purpose of this Article is to implement the social security and to avoid fraudulent claims. The regu-

項實施社會保險制度之基本國策而建立之社會安全措施。保險基金係由被保險人繳納之保險費、政府之補助及雇主之分擔額所形成，並非被保險人之私產。被保險人死亡，其遺屬所得領取之津貼，性質上係所得替代，用以避免遺屬生活無依，故應以遺屬需受扶養為基礎，自有別於依法所得繼承之遺產。勞工保險條例第二十七條規定：「被保險人之養子女，其收養登記在保險事故發生時未滿六個月者，不得享有領取保險給付之權利。」固有推行社會安全暨防止詐領保險給付之意，而同條例第六十三條至第六十五條有關遺屬津貼之規定，雖係基於倫常關係及照護扶養遺屬之原則，惟為貫徹國家負生存照顧義務之憲法意旨，並兼顧養子女及其他遺屬確受被保險人生前扶養暨無謀生能力之事實，勞工保險條例第二十七條及第六十三條至第六十五條規定應於本解釋公布之日起二年內予以修正，並依前述解釋意旨就遺屬津貼等保險給付及與此相關事項，參酌有關國際勞工公約及社會安全如年金制度等通盤檢討設計。

lations governing the survivor's benefits, stipulated in Articles 63 to 65 of the Act, are based on ethical relations and the principle of taking care of the survivor. However, it is a constitutional principle that the government is responsible for the people's welfare. Therefore, the adopted children and other survivors of the insured should be entitled to claim the survivor allowance when it is a fact that they were truly supported by the insured during his/her lifetime and they are unable to make a living after the insured dies. As a result, Articles 27, 63, 64 and 65 of the Labor Insurance Act should be amended within two years from the date of this Interpretation. Moreover, an overall examination and arrangement, regarding the survivor allowance, insurance benefits and other relevant matters, should be conducted in accordance with the principles of this Interpretation, international labor conventions and the pension plan of the social security system.

REASONING: In order to implement the fundamental national policies of labor protection (regulated by Article

解釋理由書：勞工保險係國家為實現憲法第一百五十三條保護勞工及第一百五十五條、憲法增修條文第十條

153 of the Constitution) and realization of the social security system (regulated by Article 10, Paragraph 8, of the Amendment to the Constitution), the labor insurance system is established as one of the social welfare measures. The labor insurance system is to secure workers' livelihoods and promote social security. According to international conventions and other countries' relevant systems, social insurance generally provides two kinds of protection-- cash benefits and welfare services. Cash benefits are used to compensate the insured for loss of income caused by age, disability, death, illness, maternity, work-related injuries or unemployment. This kind of benefit has the functions of helping to maintain the insured person's livelihood and substituting for income. On the other hand, social welfare services directly offer hospitalized care, medical services and rehabilitation aid. This kind of benefit is called "benefit in kind" academically. The premium paid by the insured is not the only source for the social insurance fund. The current labor insurance system in Taiwan is the same as that of other modern nations. According

第八項實施社會保險制度之基本國策而建立之社會福利措施，為社會保險之一種，旨在保障勞工生活，促進社會安全。社會保險所提供之保障，依國際公約及各國制度，通常分為兩類：金錢補助及福利服務。金錢補助係為補償被保險人因為老年、殘障、死亡、疾病、生育、工作傷害或面臨失業情況喪失所得時所為之金錢給付，此類金錢給付分別具有所得維持、所得替代之功能；社會福利服務則指直接提供諸如住院照護、醫療服務、復健扶助等，學理上稱為「實物給付」。負擔上述各項給付及服務之社會保險基金，其來源初不限於被保險人所繳納之保險費，我國現行勞工保險制度亦同。依勞工保險條例第四章規定對於被保險人或其受益人所提供之保險給付，計有生育、傷病、醫療、殘廢、老年、死亡等項，勞工保險之保險費，則依同條例第十五條所定之比例，由被保險人、投保單位分擔及中央政府與直轄市政府補助。

to Title IV of the Labor Insurance Act, the benefits paid to the insured or their beneficiaries include the benefits for maternity, injuries, illness, medical care, disability, age and death. The insured and the insurance entity pay the labor insurance premium in accordance with the percentage stipulated in Article 15 of the Act. The central government and municipal city governments also provide subsidies to the insurance fund.

When the insurance peril occurs, the insurance payments received by the insured or their beneficiaries are disbursed from the labor insurance fund, which includes the money appropriated by the government when the labor insurance system was established, the premium of the said year, the interest of the premium of the said year, the remainder left after the expenditure of insurance payment, the overdue charge of the premium, and the revenues derived from operating the fund (See Article 66 of the Labor Insurance Act). Therefore, the insurance fund, from which the insurance payment comes, is not the private property of the insured.

保險事故發生時被保險人或其受益人所受領之保險給付，係由勞工保險創立時政府一次撥付之金額、當年度保險費及其孳息之收入與保險給付支出之結餘、保險費滯納金、基金運用之收益等所形成之勞工保險基金支付之（勞工保險條例第六十六條參照），可知保險給付所由來之保險基金並非被保險人私有之財產。被保險人死亡，同條例第六十三條規定之遺屬所得領取之津貼，乃勞工保險機構出於照護各該遺屬所為之設計，用以避免其生活無依，故遺屬津貼有別於依法所得繼承之遺產，上開遺屬之範圍與民法第一千一百三十八條所定遺產繼承人亦有不同。

The allowance (regulated by Article 63 of the Labor Insurance Act) that the survivor is entitled to claim when the insured dies is paid by the labor insurance program for the purpose of taking care of the survivor and helping the survivor avoid financial difficulties. It should thus be based upon the survivor's need to be supported. Therefore, the survivor allowance is different from a lawful inheritance. The purview of survivors is also different from that of heirs as stipulated in Article 1138 of the Civil Code.

Article 27 of the Labor Insurance Act provides that "The children adopted by the insured are not entitled to claim the insurance benefits if the time between the registration of the adoption and the insurance peril is less than six months." Under this regulation, the children adopted by the insured are entitled to claim the insurance benefits only if the time between the registration of the adoption and the insurance peril is no less than six months. Although fraudulent claims can be avoided by this regulation, it can not satisfy the constitutional principle that the govern-

勞工保險條例第二十七條規定：「被保險人之養子女，其收養登記在保險事故發生時未滿六個月者，不得享有領取保險給付之權利。」以養子女收養登記滿六個月為領取保險給付之限制，雖含有防止詐領保險給付之意，惟為貫徹國家對人民無力生活者負扶助與救濟義務之憲法意旨，以收養子女經法院認可後，確有受被保險人生前扶養暨其本身無謀生能力之事實為請領遺屬津貼之要件，更能符合勞工保險條例關於遺屬津貼之制度設計。又同條例第六十三條及第六十四條之遺屬津貼，於配偶、子女、父母、祖父母係基於倫常關係，一

ment is responsible for supporting people who are incapable of making a living. Therefore, the restrictions made by Article 27 of the Labor Insurance Act should be amended. As long as the court approves the adoption and the adopted children are truly supported by the insured during his/her lifetime and they are unable to make a living after the insured dies, the adopted children should be entitled to claim the survivor allowance. Such an amendment will better satisfy the purpose of the survivor allowance system regulated in the Labor Insurance Act. Moreover, under the regulation of Articles 63 and 64 of the Act, spouses, children, parents and grandparents are entitled to claim the survivor allowance based on their ethical relationship. They may receive the benefits mentioned above unconditionally in the sequence stipulated in Article 65 of the Act. As for the insured's grandchildren and siblings, they are entitled to claim the survivor allowance only if they have been financially supported by the insured before the insured dies. The survivor allowance was originally designed to provide living expenses to the survivors

律得依同條例第六十五條順序受領。至其餘孫子女與兄弟姊妹則須有專受被保險人扶養之事實，始能受領給付，係基於應受照護扶養遺屬之原則而為之規定。然鑑於上開規定之遺屬得受領遺屬津貼，原為補貼被保險人生前所扶養該遺屬之生活費用而設，以免流離失所，生活陷於絕境，從而其請領遺屬津貼亦應同以受被保險人生前扶養暨無謀生能力之事實為要件，始符前開憲法旨意。勞工保險條例第二十七條及第六十三條至第六十五條規定應於本解釋公布之日起二年內予以修正，並依前述解釋意旨就遺屬津貼等保險給付及與此相關事項，參酌有關國際勞工公約及社會安全如年金制度等通盤檢討設計。

who were truly supported by the insured while he/she was alive, so that the survivors would not suffer from financial need after the insured dies. Therefore, the right to claim the survivor allowance should be based on the condition that the claimant is in fact supported by the insured during his/her lifetime and the claimant is unable to make a living after the insured dies. To interpret the right to claim the survivor allowance this way is more consistent with the abovementioned constitutional principle. Therefore, Articles 27, 63, 64 and 65 of the Labor Insurance Act should be amended within two years from the date of this Interpretation. Moreover, an overall examination and arrangement, regarding the survivor allowance, insurance benefits and other relevant matters, should be done in accordance with the principles of this Interpretation, international labor conventions and the pension plan of the social security system.

Justice Chi-Nan Chen filed concurring opinion.

Justice Vincent Sze filed concurring opinion.

本號解釋陳大法官計男、施大法官文森、黃大法官越欽及孫大法官森焱分別提出協同意見書。

Justice Yueh-Chin Hwang filed concurring opinion.

Justice Sen-Yen Sun filed concurring opinion.

J. Y. Interpretation No.550（October 4, 2002）*

ISSUE: Is the provision of the National Health Insurance Act constitutional in requiring that local governments contribute to the subsidy for premium payable by people residing in their respective administrative regions for the national health insurance program executed by the central government?

RELEVANT LAWS:

Articles 109, Paragraph 1, Subparagraphs 1 and 11, 110, Paragraph 1, Subparagraphs 1 and 10 , 155 and 157 of the Constitution（憲法第一百零九條第一項第一款、第十一款，第一百十條第一項第一款、第十款，第一百五十五條，第一百五十七條）; Article 10, Paragraphs 5 and 8 of the Amendments to the Constitution（憲法增修條文第十條第五項、第八項）; J. Y. Interpretation No. 279（司法院釋字第二七九號解釋）; Articles 27, Subparagraph 1, Sub-categories 1 and 2, Subparagraphs 2, 3 and 5, and 68 of the National Health Insurance Act（全民健康保險法第二十七條第一款第一、二目及第二、三、五款，第六十八條）; Articles 4, Schedule 2-III, category 10, 37, Paragraph 1, Subparagraph 1, and 38-1 of the Act Governing the Allocation of Government Revenues and Expenditures（財政收支劃分法第四條附表二、丙、直轄市支出項目第十目，第三十七條第一項第一款，第三十

* Translated by Raymond T. Chu.

** Contents within frame, not part of the original text, are added for reference purpose only.

八條之一）; Article 18, Subparagraph 3, Sub-category 1 of the Local Government Systems Act（地方制度法第十八條第三款第一目）.

KEYWORDS:

national health insurance（全民健康保險）, medical and health care（醫療保健）, public medical service（公醫制度）, social welfare activities（社會福利事項）, social relief and aid（社會救助）, local self-governing body（地方自治團體）, self-governing financial power（財政自主權）, principle of reservation of law（法律保留原則）, sharing of financial responsibility（財政責任分配）, self-responsible mechanism（自我負責機制）.**

HOLDING: In order to promote social welfare, the State shall establish a social insurance program, and to improve national health the State shall develop extensive services for sanitation and health care and a system of public medical service. These are explicitly provided in Articles 155 and 157 of the Constitution. Furthermore, Article 10 of the Amendments to the Constitution requires in Paragraphs 5 and 8 thereof that the State shall promote the national health insurance and pay special attention to social

解釋文：國家為謀社會福利，應實施社會保險制度；國家為增進民族健康，應普遍推行衛生保健事業及公醫制度，憲法第一百五十五條、第一百五十七條分別定有明文。國家應推行全民健康保險，重視社會救助、福利服務、社會保險及醫療保健等社會福利工作，復為憲法增修條文第十條第五項、第八項所明定。國家推行全民健康保險之義務，係兼指中央與地方而言。又依憲法規定各地方自治團體有辦理衛生、慈善公益事項等照顧其行政區域內居民生活之義務，亦得經由全民健康保險之實

welfare activities such as social relief and aid, welfare services, social insurance, and medical and health care. The duty of the State to promote the national health insurance rests on governments at both the central and the local levels. It is also set forth in the Constitution that each local self-governing body shall assume the duty to carry out activities in connection with sanitation, charity and public welfare for the purpose of taking care of the livelihood of the people residing within its respective administration region, and that such activities may be partly carried out through the implementation of the national health insurance program. The National Health Insurance Act promulgated on August 9, 1994, and coming into force as of March 1, 1995, is a statute enacted and executed by the central government. All administrative expenditure arising out of and in connection with the implementation of the national health insurance program must therefore be borne by the central government. However, the insurance premium at issue here, which each local self-governing body is bound to subsidize under Article 27 of the Act, is a payment

施，而獲得部分實現。中華民國八十三年八月九日公布、八十四年三月一日施行之全民健康保險法，係中央立法並執行之事項。有關執行全民健康保險制度之行政經費，固應由中央負擔，本案爭執之同法第二十七條責由地方自治團體補助之保險費，非指實施全民健康保險法之執行費用，而係指保險對象獲取保障之對價，除由雇主負擔及中央補助部分保險費外，地方政府予以補助，符合憲法首開規定意旨。

made by the insured subjects as a consideration for obtaining protection rather than cost and expenses for the implementation of the national health insurance program. It is thus consistent with the purpose contemplated by the constitutional provision cited above that each local government makes a contribution to part of the subsidy for such premium in addition to the portion borne by employers and subsidized by the central government.

While local self-governing bodies are protected by the constitutional system, and the availability of funds required for their administration is a matter within the scope of their self-governing financial power subject to the principle of legal reservation, the Constitution does not forbid the central government from requiring under law that local governments, which have the duty to act in concert in matters relating to the national health insurance program, share the subsidy for the premium insofar as such requirement is necessary for the overall administration of the State and to the extent that the core realm

地方自治團體受憲法制度保障，其施政所需之經費負擔乃涉及財政自主權之事項，固有法律保留原則之適用，但於不侵害其自主權核心領域之限度內，基於國家整體施政之需要，對地方負有協力義務之全民健康保險事項，中央依據法律使地方分擔保險費之補助，尚非憲法所不許。關於中央與地方辦理事項之財政責任分配，憲法並無明文。財政收支劃分法第三十七條第一項第一款雖規定，各級政府支出之劃分，由中央立法並執行者，歸中央負擔，固非專指執行事項之行政經費而言，惟法律於符合上開條件下，尚非不得為特別之規定，就此而言，全民健康保險法第二十

of their self-governing power is not encroached upon. The Constitution is silent in respect of the sharing of financial responsibility for matters undertaken by the central and local governments. While it is provided in the Act Governing the Allocation of Government Revenues and Expenditures, Article 37, Paragraph 1, Subparagraph 1, that expenditure of governments at all levels for matters implemented by the central government under laws enacted thereby shall be borne by the central government, the provision is not intended to mean only expenditure for administration matters, and we see no reason to preclude the making of special law so long as it meets the foregoing conditions. With this concept in mind, we hold that Article 27 of the National Health Insurance Act comes under such a special law. As regards the ratio of subsidy specified in said article to be allotted to different classes of insured persons for their premium payment, it is a matter within the scope of legislative discretion and gives rise to no question of constitutionality unless such ratio is clearly inappropriate and unreasonable.

七條即屬此種特別規定。至全民健康保險法該條所定之補助各類被保險人保險費之比例屬於立法裁量事項，除顯有不當者外，不生牴觸憲法之問題。

Where local self-governing bodies are required to share the cost for the implementation of any law such as the provision in respect of the ratio of subsidy for the premium at issue as set forth under the National Health Insurance Act, Article 27, Subparagraph 1, Items 1 and 2, and Subparagraphs 2, 3 and 5, they must be given sufficient opportunity of participation in the course of formulation of the law. For this purpose, the competent administrative agency must discuss and consult with local governments when drafting such law to avoid possible unreasonable outcome, which may result from arbitrary decisions, and must work out sound preplanning of the financial resources required for the implementation of the law. Likewise, the legislature, in revising relevant laws, must allow representatives of local governments the opportunities to be present as observers during the legislative process and to express their opinions.

法律之實施須由地方負擔經費者，如本案所涉全民健康保險法第二十七條第一款第一、二目及第二、三、五款關於保險費補助比例之規定，於制定過程中應予地方政府充分之參與。行政主管機關草擬此類法律，應與地方政府協商，以避免有片面決策可能造成之不合理情形，並就法案實施所需財源事前妥為規劃；立法機關於修訂相關法律時，應予地方政府人員列席此類立法程序表示意見之機會。

REASONING: In order to promote social welfare, the State shall establish a social insurance program, and to improve national health the State shall

解釋理由書：國家為謀社會福利，應實施社會保險制度；國家為增進民族健康，應普遍推行衛生保健事業及公醫制度；國家應推行全民健康保險及

develop extensive services for sanitation and health care and a system of public medical service. Furthermore, the State shall promote the national health insurance and pay special attention to social welfare activities such as social relief and aid, welfare services, people's employment, social insurance, and medical and health care. Expenditure for relief activities such as social relief and aid and people's employment must be given priority when preparing the national budget. These are the fundamental policies of the State explicitly laid down in Articles 155 and 157 of the Constitution and Article 10, Paragraphs 5 and 8, of the Amendments to the Constitution. While the term "State" is used in the text of a number of articles in the Constitution, whether it should be interpreted to refer solely to the central government or to include both central and local governments depends on the nature of the matter prescribed by the particular provision, and should not be generalized. The constitutional provisions relating to the fundamental policies of the State are intended to be guiding principles directed at the formulation of national

國家應重視社會救助、福利服務、國民就業、社會保險及醫療保健等社會福利工作，對於社會救助和國民就業等救濟性支出應優先編列，乃憲法第一百五十五條、第一百五十七條暨憲法增修條文第十條第五項、第八項所明定之基本國策。憲法條文中使用國家一語者，在所多有，其涵義究專指中央抑兼指地方在內，應視條文規律事項性質而定，非可一概而論。憲法基本國策條款乃指導國家政策及整體國家發展之方針，不以中央應受其規範為限，憲法第一百五十五條所稱國家為謀社會福利，應實施社會保險制度，係以實施社會保險制度作為謀社會福利之主要手段。而社會福利之事項，乃國家實現人民享有人性尊嚴之生活所應盡之照顧義務，除中央外，與居民生活關係更為密切之地方自治團體自亦應共同負擔（參照地方制度法第十八條第三款第一目之規定），難謂地方自治團體對社會安全之基本國策實現無協力義務，因之國家推行全民健康保險之義務，係兼指中央與地方而言。八十三年八月九日公布、八十四年三月一日施行之全民健康保險法，係中央立法並執行之事項。有關執行全民健康保險制度之行政經費，依同法第六十八條全民健康保險所需之設備費用及週轉金（並

policies and overall development of the nation, and must thus operate to regulate not only the central level of the government. Article 155 of the Constitution requiring that the State establish a social insurance program to promote social welfare is designed to make the implementation of a social insurance program a primary means whereby the goals of social welfare may be achieved. And social welfare activities reflect the duty of the State to take care of its people by offering them a decent life. This duty must be undertaken not only by the central government but also in concert by local self-governing bodies, which are even more closely related to the lives of the people residing in their respective regions (See the Local Government Systems Act, Article 18, Subparagraph 3, Item 3) and should not be considered free of any duty to work with the central government in concerted efforts to make the fundamental policies relating to social security a reality. It follows therefore that the duty of the State to put forward a national health insurance program rests on both the central and the local governments. The National Health

人事、行政管理經費），固應由中央撥付，依憲法第一百零九條第一項第一款、第十一款暨第一百十條第一項第一款、第十款，各地方自治團體尚有辦理衛生、慈善公益事項等照顧其行政區域內居民生活之責任，此等義務雖不因全民健康保險之實施而免除，但其中部分亦得經由全民健康保險獲得實現。本案爭執之全民健康保險法第二十七條責由地方自治團體按一定比例計算，補助各該類被保險人負擔之保險費，非屬實施全民健康保險法之執行費用，乃指保險對象獲取保障之對價，而成為提供保險給付之財源。此項保險費除由雇主負擔及中央補助部分外，地方政府予以補助，合於憲法要求由中央與地方共同建立社會安全制度之意旨，與首揭憲法條文尚無牴觸。本院釋字第二七九號解釋亦本此意旨，認省（市）政府負擔勞工保險補助費乃其在勞工福利上應負之義務而釋示在案。

Insurance Act promulgated on August 9, 1994, and coming into force as of March 1, 1995, is a statute enacted and executed by the central government. Under Article 68 of the Act which provides that all costs and expenses for facilities, equipment and working funds (including personnel costs and management expenses) necessary for the national health insurance program shall be paid by the central government; thus, the administrative expenditure arising out of and in connection with the implementation of the national health insurance program must therefore be borne by the central government. However, it is provided by the Constitution in Article 109, Paragraph 1, Subparagraphs 1 and 11, and Article 110, Paragraph 1, Subparagraphs 1 and 10, that local self-governing bodies shall have the duty to carry out activities in connection with sanitation, charity and public welfare for the purpose of taking care of the livelihood of the people residing within their respective administration regions. While such duty may be partly fulfilled through the implementation of the national health insurance program, it is not discharged by

the implementation of the program. The insurance premium at issue here, which each local self-governing body is bound to subsidize at a specified rate under Article 27 of the Act, is a payment made by the insured subjects as a consideration for obtaining protection and as the financial resources for insurance payment rather than cost and expenses for the implementation of the national health insurance program. It is thus consistent with the purpose contemplated by the constitutional provisions cited above that all local governments join with the central government in establishing a social security system by subsidizing a part of the premium in addition to the portion borne by employers and subsidized by the central government. This was also what we had in mind in deciding our Interpretation No. 279 in which we held that the subsidy granted by a provincial or municipal government as a contribution to the premium for labor insurance constituted the performance of such government's duty in respect to workers' welfare.

While local self-governing bodies

地方自治團體受憲法制度保障，

are protected by the constitutional system, and the availability of funds required for their administration is a matter within the scope of their self-governing financial power subject to the principle of legal reservation, the Constitution does not forbid the central government from requiring under law that local governments share the subsidy to the premium insofar as such requirement is necessary for the overall administration of the State and to the extent that the core realm of their self-governing power is not encroached upon. By "encroachment upon the core realm" we mean jeopardy to the essence of the autonomous power of local self-governing bodies to such an extent that the protection guarding the system of local self-governing bodies becomes fictional. This includes preparation of budgets by the central government for and on behalf of local governments and the requirement that local governments share expenses for matters totally unrelated with the duty and functions of local governments such as foreign affairs and national defense. Where local self-governing bodies are required by law to assume the duty to lend

其施政所需之經費負擔乃涉及財政自主權之事項，固有法律保留原則之適用，於不侵害其自主權核心領域之限度內，基於國家整體施政需要，中央依據法律使地方分擔保險費之補助，尚非憲法所不許。前述所謂核心領域之侵害，指不得侵害地方自治團體自主權之本質內容，致地方自治團體之制度保障虛有化，諸如中央代替地方編製預算或將與地方政府職掌全然無關之外交、國防等事務之經費支出，規定由地方負擔等情形而言。至於在權限劃分上依法互有協力義務，或由地方自治團體分擔經費符合事物之本質者，尚不能指為侵害財政自主權之核心領域。關於中央與地方辦理事項之財政責任分配，憲法並無明文。財政收支劃分法第三十七條第一項就各級政府支出之劃分，於第一款雖規定「由中央立法並執行者，歸中央」，固非專指執行事項之行政經費而言，然法律於符合首開條件時，尚得就此事項之財政責任分配為特別規定，矧該法第四條附表二、丙、直轄市支出項目，第十目明定社會福利支出，包括「辦理社會保險、社會救助、福利服務、國民就業、醫療保健等事業及補助之支出均屬之」。本案爭執之全民健康保險法第二十七條即屬此種特別規定，其支出之項

concerted efforts in the division of powers or to share expenditure for matters related with the essence of self-government, we do not believe the core realm of their self-governing financial powers is being jeopardized. The Constitution is silent in respect of the sharing of financial responsibility for matters undertaken by the central and local governments. While it is provided in the Act Governing the Allocation of Government Revenues and Expenditures, Article 37, Paragraph 1, Subparagraph 1, that expenditure of governments at all levels for matters implemented by the central government under laws enacted thereby shall be borne by the central government, the provision is not intended to mean only expenditure for administration matters. For this purpose, special provisions may be made in order to define the sharing of financial responsibilities so long as the law meets the foregoing conditions, more so in view of the provision of the Act in Schedule 2-III whereby "subsidy and expenditure for social insurance, social relief and aid, social welfare, people's employment, medical and health care, and other activities" are listed under

目與上開財政收支劃分法附表之內容，亦相符合。至該條各款所定補助各類被保險人保險費之比例屬立法裁量事項，除顯有不當者外，尚不生牴觸憲法問題。

category 10 "social welfare expenditure of municipalities under direct jurisdiction of the Executive Yuan." Undoubtedly, the issue here with respect to Article 27 of the National Health Insurance Act has to do with such special legislation, and the items of expenditure in question come under the category specified in Schedule 2 of the Act Governing the Allocation of Government Revenues and Expenditures. As regards the ratio of subsidy specified in said article to be allotted to different classes of the insured for their premium payment, it is a matter within the scope of legislative discretion and gives rise to no question of constitutionality unless such ratio is clearly inappropriate and unreasonable.

Where local self-governing bodies are required to share the cost and expenses for the implementation of any law such as the provision in respect of the ratio of subsidy for the premium at issue as set forth under the National Health Insurance Act, Article 27, Subparagraph 1, Items 1 and 2, and Subparagraphs 2, 3 and 5, they must be given sufficient opportu-

法律之實施須由地方負擔經費者，即如本案所涉全民健康保險法第二十七條第一款第一、二目及第二、三、五款關於保險費補助比例之規定，於制定過程中應予地方政府充分之參與，俾利維繫地方自治團體自我負責之機制。行政主管機關草擬此類法律，應與地方政府協商，並視對其財政影響程度，賦予適當之參與地位，以避免有片面決策

nity for participation in the course of formulation of the law in order to preserve the self-responsible mechanism of local self governing bodies. For this purpose, the competent administrative agency, when drafting such law, must discuss and consult with local governments and allow them reasonable opportunity of participation in light of the possible impact of the law on their financial conditions, so as to avoid possible unreasonable outcomes, which may result from arbitrary decisions, and must work out sound preplanning of the financial resources required for the implementation of the law under Article 38-1 of the Act Governing the Allocation of Government Revenues and Expenditures. Likewise, the legislature, in revising relevant laws, must allow representatives of local governments the opportunities to be present as observers during the legislative process and to express their opinions.

可能造成之不合理情形，且應就法案實施所需財源，於事前妥為規劃，自應遵守財政收支劃分法第三十八條之一之規定。立法機關於修訂相關法律時，應予地方政府人員列席此類立法程序表示意見之機會。

Justice Chi-Nan Chen filed concurring opinion.

Justice Tong-Schung Tai filed concurring opinion.

本號解釋陳大法官計男、戴大法官東雄及蘇大法官俊雄分別提出協同意見書；黃大法官越欽、王大法官和雄及施大法官文森分別提出部分不同意見書；董大法官翔飛提出不同意見書。

Justice Jyun-Hsiung Su filed concurring opinion.

Justice Yueh-Chin Hwang filed dissenting opinion in part.

Justice Ho-Hsiung Wang filed dissenting opinion in part.

Justice Vincent Sze filed dissenting opinion in part.

Justice Hsiang-Fei Tung filed dissenting opinion.

J. Y. Interpretation No.551（November 22, 2002）*

ISSUE: Is the Drug Control Act constitutional in providing that any person who makes a false or malicious accusation against another person for the crimes specified in the said Act by framing said person or fabricating evidence shall be sentenced to the criminal punishment imposed by the offence he/she accused another of?

RELEVANT LAWS:

Articles 8, 15 and 23 of the Constitution（憲法第八條、第十五條及第二十三條）; J. Y. Interpretation No.476（司法院釋字第四七六號解釋）; Articles 4, 5, 6, 7, 8, 12 and 16 of the Drug Control Act（毒品危害防制條例第四條、第五條、第六條、第七條、第八條、第十二條及十六條）; Article 15 of the Narcotics Elimination Act during the Period for Suppression of the Communist Rebellion（戡亂時期肅清煙毒條例第十五條）.

KEYWORDS:

personal freedom（身體自由）, right of existence（生存權）, false accusation（栽贓）, framing（誣陷）, fabricating evidence to bring fictitious action（捏造證據誣告）, drug（毒品）, right to criminal punishment（刑罰權）.**

* Translated by Wei-Feng Huang of THY Taiwan International Law Offices.

** Contents within frame, not part of the original text, are added for reference purpose only.

HOLDING: It is stipulated in Articles 8 and 15 of the Constitution that the people's physical freedom and right to life should be protected. To exercise the State's power of criminal punishment properly and to regulate special matters through special punishments in special criminal legislations, the content of such legislations must have proper objectives, and adopt necessary means and appropriate restrictions in order to comply with the provision in Article 23 of the Constitution. This has been explained in this Yuan's Interpretation No.476. The legislative objectives of the Drug Control Act, amended and promulgated on May 20, 1998, were to eliminate drugs, to prevent the harmful effect of drugs on individuals, to preserve the people's physical and mental well-being, and to maintain the social order and public interests -- these have been regulated by special legislations. With respect to persons violating the said Act by making false accusations or fabricating evidence to bring fictitious actions, they fall outside of the ordinary false accusation provisions under the Criminal Code and are to be punished under the special

解釋文：人民身體之自由與生存權應予保障，為憲法第八條、第十五條所明定，國家為實現刑罰權，將特定事項以特別刑法規定特別之罪刑，其內容須符合目的正當性、手段必要性、限制妥當性，方符合憲法第二十三條之規定，業經本院釋字第四七六號解釋闡釋在案。中華民國八十七年五月二十日修正公布之毒品危害防制條例，其立法目的係為肅清煙毒、防制毒品危害，維護國民身心健康，藉以維持社會秩序及公共利益，乃以特別法加以規範。有關栽贓誣陷或捏造證據誣告他人犯該條例之罪者，固亦得於刑法普通誣告罪之外，斟酌立法目的而為特別處罰之規定。然同條例第十六條規定：「栽贓誣陷或捏造證據誣告他人犯本條例之罪者，處以其所誣告之罪之刑」，未顧及行為人負擔刑事責任應以其行為本身之惡害程度予以非難評價之刑法原則，強調同害之原始報應刑思想，以所誣告罪名反坐，所採措置與欲達成目的及所需程度有失均衡；其責任與刑罰不相對應，罪刑未臻相當，與憲法第二十三條所定比例原則未盡相符。有關機關應自本解釋公布之日起兩年內通盤檢討修正，以兼顧國家刑罰權之圓滿正確運作，並維護被誣告者之個人法益；逾期未為修正者，前

provisions of the Act. However, Article 16 of the same Act, which provides that: "Any person who violates this Act by bringing false accusations or fabricating evidence to bring fictitious actions shall be sentenced to criminal punishment imposed by the offence which he/she accuses others of," does not take into consideration the Criminal Code's principle of attribution of criminal liability based on the conduct's culpability. Rather, it emphasizes the notion of retaliation by punitive punishment such that the person who falsely accused others of an offence will be liable for punishment imposed by such offence. The means adopted, the intended results and the required degree of punishment are disproportionate; the person's liability and criminal punishment are incompatible, that is, the offence and its penalty are disproportionate; therefore, they fail to comply with the principle of proportionality stipulated in Article 23 of the Constitution. The relevant authority shall review and amend the legislation within two years from the date of this Interpretation in order to insure the correct and successful operation of the State's

開條例第十六條誣告反坐之規定失其效力。

power of criminal punishment and protect the private legal interests of persons falsely accused. Where no amendment takes place after the prescribed period, the provisions under Article 16 of the above-mentioned Act concerning punishment of the accusation offences shall cease to be effective.

REASONING: Articles 8 and 15 of the Constitution stipulate that the people's physical freedom and right of existence should be protected. To exercise the State's right of criminal punishment properly, legislative authority may, in pursuance of certain objectives, regulate special matters through special punishments in special criminal legislations, and the contents of such legislations must comply with the requirements stipulated in Article 23 of the Constitution. Laws which abridge people's freedom or deprive them of their right to life must take into consideration whether the ends can be achieved through other less intrusive means besides those conducive to the achievement of legislative intentions. The degree of punishment shall be reasonable and necessary

解釋理由書：憲法第八條、第十五條明定人民身體之自由與生存權應予保障。立法機關為實現國家刑罰權，本於一定目的，對於特定事項以特別刑法規定特別之罪刑，其內容須符合憲法第二十三條所定要件。法律對於人民自由之處罰或剝奪其生存權，除應有助於達成立法目的，尚須考量有無其他效果相同且侵害人民較少之手段，處罰程度與所欲達成目的間並應具備合理必要之關係，方符合憲法第二十三條規定之比例原則，業經本院釋字第四七六號解釋闡釋在案。八十七年五月二十日修正公布之毒品危害防制條例，其立法目的係為肅清煙毒、防制毒品危害，維護國民身心健康，藉以維持社會秩序及公共利益，乃以特別法加以規範，例如第四條規定：「製造、運輸、販賣第一級毒品者，處死刑或無期徒刑；處無期徒刑

to the achievement of the intended ends in order to comply with the principle of proportionality stipulated in Article 23 of the Constitution. The foregoing has been explained in this Yuan’s Interpretation No.476. The legislative objectives of the Drug Control Act, amended and promulgated on May 20, 1998, were to eliminate drugs, to prevent the harmful effect of drugs on individuals, to preserve the people’s physical and mental well-being, and to maintain the social order and public interests -- these have been regulated by special legislations. As an illustration, Article 4 provides that: “Any person who produces, transports or sells Class 1 drugs shall be sentenced to the death penalty, or life imprisonment with a fine not exceeding 10 million New Taiwan dollars”; “Any person who produces, transports or sells Class 2 drugs shall be sentenced to life imprisonment or imprisonment for more than 7 years, along with a fine not exceeding 7 million New Taiwan dollars”; “Any person who produces, transports or sells Class 3 drugs shall be sentenced to imprisonment for more than 5 years with a fine not exceeding 5 million New Tai-

者，得併科新臺幣一千萬元以下罰金。」「製造、運輸、販賣第二級毒品者，處無期徒刑或七年以上有期徒刑，得併科新臺幣七百萬元以下罰金。」「製造、運輸、販賣第三級毒品者，處五年以上有期徒刑，得併科新臺幣五百萬元以下罰金。」「製造、運輸、販賣專供製造或施用毒品之器具者，處一年以上七年以下有期徒刑，得併科新臺幣一百萬元以下罰金。」「前四項之未遂犯罰之。」同條例第五條、第六條、第七條、第八條及第十二條等規定亦然。有關栽贓誣陷或捏造證據誣告他人犯該條例之罪者，若衡酌其惡害程度非輕，須受較重之非難評價，固亦得於刑法普通誣告罪之外，斟酌立法目的而為特別處罰之規定。然同條例第十六條規定：「栽贓誣陷或捏造證據誣告他人犯本條例之罪者，處以其所誣告之罪之刑。」此項規定係承襲原戡亂時期肅清煙毒條例第十五條規定而來，固有其時代背景及立法政策之考量，然與該條例規定製造、運輸、販賣、施用、轉讓、持有或栽種毒品等行為之不法內涵及暴利特質兩不相侔，逕依所誣告之罪反坐，顯未考量行為人之誣告行為並未涉及毒品或其原料、專供施用器具等之製造、散布或持有，亦無令他人施用毒品致損及健

wan dollars"; "Any person who produces, transports or sells equipment/paraphernalia for the production or application of drugs shall be liable to a term of imprisonment exceeding 1 year but less than 7 years, with a fine not exceeding 1 million New Taiwan dollars"; and "Any person who attempts to commits offences under the foregoing four Paragraphs shall be so punished." Provisions under Articles 5, 6, 7, 8 and 12 of the same Act have the same stipulations. With respect to persons violating the said Act by making false accusations or fabricating evidence to bring fictitious actions, they shall be subject to a more severe criminal liability if the harm done is serious. These types of conduct fall outside of the ordinary false accusation provisions under the Criminal Code, and are to be punished under the special provisions of the Act. However, Article 16 of the same Act provides that: "Any person who violates this Act by bringing false accusations or fabricating evidence to bring fictitious actions shall be sentenced to the criminal punishment imposed by the offence which he/she accused others of." This provision originates

康等危險，與該條例肅清煙毒、防制毒品危害之立法目的與嚴於其刑之規定，並無必然關聯，而未顧及行為人負擔刑事責任應以其行為本身之惡害程度予以非難評價之刑法原則，強調同害之原始報應刑思想，以所誣告罪名反坐，所採措置與欲達成目的及所需程度有失均衡；其責任與刑罰不相對應，罪刑未臻相當，與憲法第二十三條規定之比例原則未盡相符。有關機關應自本解釋公布之日起兩年內通盤檢討修正，以兼顧國家刑罰權之圓滿正確運作，並維護被誣告者之個人法益；逾期未為修正者，前開條例第十六條誣告反坐之規定失其效力。

from Article 15 of the Narcotics Elimination Act during the Period for Suppression of the Communist Rebellion which takes into consideration the special circumstances of that time and the then existing legislative policies. However, the nature of illegality and improper gain in relation to the production, sale, application, supply, possession or planting of drugs mentioned in the said Act are incompatible. The imposition of criminal punishment on a person for the offence he/she has accused others of does not take into consideration the fact that the offender's conduct does not involve drugs or the production, dispersion or possession of the raw material or equipment/drug paraphernalia, nor does it present a danger to other people's health by applying drugs for use. The said conduct of the offender has no relevance to the legislative intentions of eliminating narcotics, preventing the harmful effects of drugs, and severe punishment in the said Act. The abovementioned Article does not account for the Criminal Code's principle of attribution of criminal liability based on the conduct's culpability. Rather, it emphasizes the notion of retalia-

tion by punitive punishment such that the person who falsely accuses others of an offence will be liable for punishment imposed by such offence. The means adopted, the intended results and the required degree of punishment are disproportionate; the personal liability and criminal punishment are incompatible; that is, the offence and its penalty are disproportionate and therefore fail to comply with the principle of proportionality stipulated in Article 23 of the Constitution. The relevant authority shall review and amend the legislation within two years from the date of this Interpretation in order to insure the correct and successful operation of the State's power of criminal punishment and protect the private legal interests of persons falsely accused. Where no amendment takes place after the prescribed period, the provisions under Article 16 of the abovementioned Act concerning punishment of the accusation offences shall cease to be effective.

J. Y. Interpretation No.552（December 13, 2002）*

ISSUE: In order to safeguard the monogamous system and the social order so established, shall the J. Y. Interpretation No.362 in which it is ruled that in a "special circumstance" where a bona fide third person, in reliance upon a court judgment that puts an end to a prior marriage, contracts a marriage with one of the parties thereto, the validity of this putative marriage must be upheld despite the fact that the judgment dissolving the prior marriage is subsequently reversed, be appended and overruled in part to the extent that the validity of the putative marriage shall be limited to the circumstances where the both parties thereto act in good faith and without fault?

RELEVANT LAWS:

Article 22 of the Constitution（憲法第二十二條）; J. Y. Interpretation No. 362（司法院釋字第三六二號解釋）; Articles 988, Subparagraph 2, 1050 and 1052, Paragraph 1, Subparagraphs 1 and 2, of the Civil Code（民法第九百八十八條第二款、第一千零五十條、第一千零五十二條第一項第一款、第二款）.

KEYWORDS:

bigamy（重婚（行為））, bigamous marriage（重婚（婚姻））, bigamus（重婚者）, monogamy（一夫一妻婚姻）,

*Translated by Raymond T. Chu.

** Contents within frame, not part of the original text, are added for reference purpose only.

prior (first) marriage（前婚姻）, subsequent (putative) marriage（後婚姻）, principle of protection reliance（信賴保護原則）, freedom of marriage（結婚自由權利, 婚姻自由）, matrimonial cohabitation（夫妻共同生活）, divorce by consent（協議離婚）, append（補充）.**

HOLDING: It has been held by this Yuan's Interpretation No. 362 that "the provision of Article 988, Subparagraph 2, of the Civil Code, whereby a bigamous marriage is null and void, is intended to maintain the social order based on the monogamous system, and is generally speaking consistent with the Constitution. However, where a prior marriage is dissolved in consequence of an irrevocable judgment and a third person, in good faith and without negligence, contracts a marriage with one of the parties to the prior marriage in reliance of such judgment, which is subsequently reversed, making the subsequent marriage bigamous, the situation is distinguishable from bigamy in its ordinary sense, and the validity of the subsequentmarriage must be maintained on the principle of reliance

解釋文：本院釋字第三六二號解釋謂：「民法第九百八十八條第二款關於重婚無效之規定，乃所以維持一夫一妻婚姻制度之社會秩序，就一般情形而言，與憲法尚無牴觸。惟如前婚姻關係已因確定判決而消滅，第三人本於善意且無過失，信賴該判決而與前婚姻之一方相婚者，雖該判決嗣後又經變更，致後婚姻成為重婚，究與一般重婚之情形有異，依信賴保護原則，該後婚姻之效力，仍應予以維持。首開規定未兼顧類此之特殊情況，與憲法保障人民結婚自由權利之意旨未盡相符，應予檢討修正。」其所稱類此之特殊情況，並包括協議離婚所導致之重婚在內。惟婚姻涉及身分關係之變更，攸關公共利益，後婚姻之當事人就前婚姻關係消滅之信賴應有較為嚴格之要求，僅重婚相對人之善意且無過失，尚不足以維持後婚姻之效力，須重婚之雙方當事人均為善意且

protection *(Vertrauenschutzprinzip)*. The aforesaid provision of the Civil Code is inadequate in dealing with such a special circumstance as described above and is thus inconsistent with the intent of the Constitution to protect the freedom of marriage, and must be reviewed for the purpose of revision." The so-called "special circumstance" includes bigamous marriages in consequence of divorce by agreement. Nevertheless, as marriage involves change in the relation of personal status, which has to do with the public interest, the parties to the second marriage must be required to meet more stringent tests in respect of their reliance on the dissolution of the prior marriage rather than relying on mere good faith and lack of negligence on the part of the person with whom he or she contracts the second marriage. In order to retain the validity of the second marriage, both parties to such marriage must be found to be in good faith and without fault. Interpretation No. 362 is hereby appended. If it results in such a circumstance that both the first and the second marriages exist in force at the same time, the question of which one of

無過失時，後婚姻之效力始能維持，就此本院釋字第三六二號解釋相關部分，應予補充。如因而致前後婚姻關係同時存在時，為維護一夫一妻之婚姻制度，究應解消前婚姻或後婚姻、婚姻被解消之當事人及其子女應如何保護，屬立法政策考量之問題，應由立法機關衡酌信賴保護原則、身分關係之本質、夫妻共同生活之圓滿及子女利益之維護等因素，就民法第九百八十八條第二款等相關規定儘速檢討修正。在修正前，對於符合前開解釋意旨而締結之後婚姻效力仍予維持，民法第九百八十八條第二款之規定關此部分應停止適用。在本件解釋公布之日前，僅重婚相對人善意且無過失，而重婚人非同屬善意且無過失者，此種重婚在本件解釋後仍為有效。如因而致前後婚姻關係同時存在，則重婚之他方，自得依法向法院請求離婚，併此指明。

the two marriages should be dissolved so as to maintain the monogamous system and the issues with respect to what protection must be accorded to the party whose marriage is dissolved and his/her children must be answered by the lawmakers upon making the earliest possible review of and revision to Article 988, Subparagraph 2, of the Civil Code by taking into consideration such factors as the principle of reliance protection *(Vertrauenschutzprinzip)*, the nature of the relation of personal status, the satisfaction of matrimonial cohabitation, and the protection of the interests of the children. Before the law is so amended, however, the validity of the second marriage consummated in conformity with the essence of our holding in this Interpretation must be upheld, and the relevant part of the provision of Article 988, Subparagraph 2, of the Civil Code must cease to be operative. A bigamous marriage contracted before the date of this Interpretation will remain valid after the issuance of this Interpretation only if the person to whom the actor was married was found to be in good faith and without fault, although the actor might have acted

otherwise. Incidentally, if it so happens that both the first and the second marriages exist simultaneously, the other party to the bigamous marriage may sue for divorce.

REASONING: The purposes of the monogamous system are to maintain the personal and ethical relationship between husband and wife and to realize the principle of equality between men and women, thereby preserving the social order, and the system is thus protected by the Constitution. To this end, the Civil Code makes a bigamous marriage invalid under Article 988, Subparagraph 2. While the freedom of marriage is one of the freedoms safeguarded by the Constitution, it is subject to the restraint put on it by the monogamous system. It has been held by this Yuan Interpretation No. 362 that "the provision of Article 988, Subparagraph 2, of the Civil Code whereby a bigamous marriage is made null and void is intended to maintain the social order based on the monogamous system, and is generally speaking consistent with the Constitution. solved in consequence of an irrevocable

解釋理由書：一夫一妻婚姻制度係為維護配偶間之人格倫理關係，實現男女平等原則，及維持社會秩序，應受憲法保障。民法第九百八十八條第二款關於重婚無效之規定，即本此意旨而制定。婚姻自由雖為憲法上所保障之自由權，惟應受一夫一妻婚姻制度之限制。本院釋字第三六二號解釋謂：「民法第九百八十八條第二款關於重婚無效之規定，乃所以維持一夫一妻婚姻制度之社會秩序，就一般情形而言，與憲法尚無牴觸。惟如前婚姻關係已因確定判決而消滅，第三人本於善意且無過失，信賴該判決而與前婚姻之一方相婚者，雖該判決嗣後又經變更，致後婚姻成為重婚，究與一般重婚之情形有異，依信賴保護原則，該後婚姻之效力，仍應予以維持。首開規定未兼顧類此之特殊情況，與憲法保障人民結婚自由權利之意旨未盡相符，應予檢討修正。」其所稱類此之特殊情況，並包括協議離婚等其在內。就協議離婚言，雖基於當事人之

However, where the prior marriage is dis judgment and a third person, in good faith and without negligence, contracts a marriage with one of the parties to the prior marriage in reliance of such judgment, which is subsequently reversed, making the subsequent marriage bigamous, the situation is distinguishable from bigamy in its ordinary sense and the validity of the subsequent marriage must be maintained on the principle of reliance protection *(Vertrauenschutzprinzip)*. The aforesaid provision of the Civil Code is inadequate in dealing with such a special circumstance as described above and is thus inconsistent with the intent of the Constitution to protect the freedom of marriage, and must be reviewed for the purpose of revision." The so-called "special circumstance" includes bigamous marriages in consequence of divorce by agreement and other situations where a third person is made to reasonably rely [on the actor's eligibility to marry or remarry]. Insofar as divorce by agreement is concerned, while it is based on the mutual assent of the parties to the marriage, Article 1050 of the Civil Code requires that it be recorded in

他足以使第三人產生信賴所導致之重婚合意，但依民法第一千零五十條規定應為離婚之戶籍登記，第三人對此離婚登記之信賴，亦應同受保護。惟婚姻不僅涉及當事人個人身分關係之變更，且與婚姻人倫秩序之維繫、家庭制度之健全、子女之正常成長等公共利益攸關，後婚姻之當事人就前婚姻關係消滅之信賴應有較為嚴格之要求，僅重婚相對人之善意，尚不足以維持後婚姻之效力，須重婚之雙方當事人均為善意且無過失時，後婚姻效力始能維持，以免重婚破壞一夫一妻婚姻制度，就此本院釋字第三六二號解釋相關部分，應予補充。如因而致前後婚姻關係同時存在時，為維護一夫一妻之婚姻制度，究應解消前婚姻或後婚姻、婚姻被解消之當事人，即解消後婚時，對後婚善意且無過失之重婚相對人；於解消前婚時，對前婚之重婚者他方，應如何保護，及對前後婚姻關係存續中所生之子女，在身分、財產上應如何保障，屬立法政策考量之問題，應由立法機關衡酌信賴保護原則、身分關係之本質、夫妻共同生活之圓滿及子女利益之維護等因素，就民法第九百八十八條第二款等相關規定儘速檢討修正。在修正前，對於符合前開解釋意旨而締結之後婚姻效力仍予維持，民法

the household registry. Thus, the third person who relies on such divorce recordation must likewise be protected. Nevertheless, as marriage involves not only change in the relation of personal status of the parties to the marriage, but also such matters concerning public interest as the maintenance of the ethical order of marriage, the health of the family system, and the normal development of the children, the parties to the second marriage must therefore be required to meet more stringent tests in respect of their reliance on the dissolution of the prior marriage rather than mere good faith and lack of negligence on the part of the person with whom he or she contracts the second marriage. In order to retain the validity of the second marriage, both parties thereto must be found to be in good faith and without fault so that the monogamous system will not be jeopardized. Interpretation No. 362 is hereby supplemented. If it results in such a circumstance that both the first and the second marriages exist in force at the same time, the question of which one of the two marriages should be dissolved so as to defend the monogamous system and

第九百八十八條第二款之規定關此部分應停止適用。在本件解釋公布之日前，僅重婚相對人善意且無過失，而重婚人非同屬善意且無過失者，此種重婚在本件解釋後仍為有效。如因而致前後婚姻關係同時存在，則後婚之重婚相對人或前婚之重婚者他方，依民法第一千零五十二條第一項第一款或第二項規定，自得向法院請求離婚，併此指明。

the issues of what protection must be accorded to the bona fide and faultless party whose marriage is dissolved, i.e., the bona fide and faultless party to the bigamous marriage in case of dissolution of the second marriage or the other party to the first marriage in case of dissolution of the first marriage, and the protection to be accorded to the children born out of the prior and the subsequent marriages in respect of their identity and property must be answered by the lawmakers upon making earliest possible review of and revision to Article 988, Subparagraph 2, of the Civil Code by taking into consideration such factors as the principle of reliance protection *(Vertrauenschutzprinzip)*, the nature of the relation of personal status, the satisfaction of matrimonial cohabitation, and the protection of the interests of the children. Before the law is so amended, however, the validity of the second marriage consummated in conformity with the essence of our holding in this Interpretation must be upheld, and the relevant part of the provision of Article 988, Subparagraph 2, of the Civil Code must cease to be operative. A bigamous

marriage contracted before the date of this Interpretation will remain valid after the issuance of this Interpretation only if the person to whom the actor was married was found to be in good faith and without fault, although the actor might have acted otherwise. Incidentally, if it so happens that both the first and the second marriages exist simultaneously, the other party with whom the bigamous marriage is contracted or the party to the first marriage other than the bigamous one may sue for divorce under Article 1052, Paragraph 1, Subparagraph 1, or Paragraph 2, of the Civil Code.

Justice Tze-Chien Wang filed concurring opinion.

Justice Sen-Yen Sun filed concurring opinion.

Justice Jyun-Hsiung Su filed concurring opinion.

Justice Tong-Schung Tai filed concurring opinion.

Justice Hua-Sun Tseng filed dissenting opinion.

Justice Tieh-Cheng Liu filed dissenting opinion.

本號解釋王大法官澤鑑、孫大法官森焱、蘇大法官俊雄及戴大法官東雄分別提出協同意見書；曾大法官華松、劉大法官鐵錚分別提出不同意見書。

J. Y. Interpretation No.553（December 20, 2002）*

ISSUE: Is the decision made by Taipei City to postpone the election for heads of *li*, the basic unit of the city's administration, due to a redistricting of such basic unit of city administration, consistent with the provision of Article 83-I of the local Government Systems Act regarding "exceptional events"?

RELEVANT LAWS:

Articles 78 and 118 of the Constitution（憲法第七十八條、第一百十八條）; Article 5, Paragraph 4, of the Amendments to the Constitution（憲法增修條文第五條第四項）; J. Y. Interpretation No. 527（司法院釋字第五二七號解釋）; Articles 59, 75, 76, 77, and 83 of the Local Government Systems Act（地方制度法第五十九條、七十五條、第七十六條、第七十七條、第八十三條）; Articles 1, 61 and 79 of the Administrative Appeal Act（訴願法第一條、第六十一條、第七十九條）; Article 4 of the Administrative Procedure Act（行政訴訟法第四條）.

KEYWORDS:

local self-governance（地方自治）, *li*[1] executive（里長）, Taipei Municipal Government（臺北市政府）.**

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* Translated and edited by Professor Andy Y. Sun.

** Contents within frame, not part of the original text, are added for reference purpose only.

[1] Li（里）is the administrative unit or sub-district for local governance placed between the borough or district of a city/county and lin (鄰，which may be literally translated as "neighborhood") , the basic unit for local governance. A lin normally consists of several registered households on the same block and a li is more or less equivalent to a subdivision in deed recordation, comprising several lins within each township, county, or city borough/district (See Article 3 of the Local Government Systems Act.)

HOLDING: The Taipei Municipal Government filed the present petition in accordance with Article 75, Paragraph 2, of the Local Government Systems Act, alleging that the central governing authority, the Ministry of the Interior and subsequently the Executive Yuan, erroneously relied on Article 75, Paragraph 1, of that Act by revoking the municipality's decision to postpone the election of *li* executives for the reason that such a decision was in violation of Article 83 of the same Act. Because the city of Taipei is a protected local self-governance entity under Article 118 of the Constitution and in light of the fact that this petition concerns the delineation of jurisdictional boundaries and the dispute resolution mechanism between the local and central governments, this petition is not a mere dispute involving the interpretation of statutes among (different) government agencies; rather, it reaches the constitutional level of correlations between the fundamental principles of democratic operations and jurisdictions of local self-governance. Hence, an interpretation is warranted.

解釋文：本件係台北市政府因決定延期辦理里長選舉，中央主管機關內政部認其決定違背地方制度法第八十三條第一項規定，經報行政院依同法第七十五條第二項予以撤銷；台北市政府不服，乃依同條第八項規定逕向本院聲請解釋。因台北市為憲法第一百十八條所保障實施地方自治之團體，且本件事關修憲及地方制度法制定後，地方與中央權限劃分及紛爭解決機制之釐清與確立，非純屬機關爭議或法規解釋之問題，亦涉及憲法層次之民主政治運作基本原則與地方自治權限之交錯，自應予以解釋。

Article 83, Paragraph 1, of the Local Government Systems Act states, “In the event a special election is needed to fill the office of a city council member, mayor, county (municipality) assembly member, county (municipality) executive, county (township, conurbation) delegate, burgh executive and village (*li*) executive due to term expiration or vacancy created, such an election may be postponed in light of special circumstances.” Conceptually, the so-called “special circumstances” can not possibly be [fully] illustrated by [listing all] specific events, and are generally considered to be unforeseeable, extraordinary events that result in special elections not being held at the legally mandated time. [It also refers to the situations where] sufficient evidence suggests that an improper outcome or clear and present danger may ensue, or may be contrary to the reasonable and necessary administrative purpose for the realization of local self-governance, if and when the election is to be held on time. Furthermore, “special circumstances” are limited to those that do not affect national jurisdiction or the entire jurisdictions within a

地方制度法第八十三條第一項規定：「直轄市議員、直轄市長、縣（市）議員、縣（市）長、鄉（鎮、市）民代表、鄉（鎮、市）長及村（里）長任期屆滿或出缺應改選或補選時，如因特殊事故，得延期辦理改選或補選。」其中所謂特殊事故，在概念上無從以固定之事故項目加以涵蓋，而係泛指不能預見之非尋常事故，致不克按法定日期改選或補選，或如期辦理有事實足認將造成不正確之結果或發生立即嚴重之後果或將產生與實現地方自治之合理及必要之行政目的不符等情形者而言。又特殊事故不以影響及於全國或某一縣市全部轄區為限，即僅於特定選區存在之特殊事故如符合比例原則之考量時，亦屬之。上開法條使用不確定法律概念，即係賦予該管行政機關相當程度之判斷餘地，蓋地方自治團體處理其自治事項與承中央主管機關之命辦理委辦事項不同，前者中央之監督僅能就適法性為之，其情形與行政訴訟中之法院行使審查權相似（參照訴願法第七十九條第三項）；後者除適法性之外，亦得就行政作業之合目的性等實施全面監督。本件既屬地方自治事項又涉及不確定法律概念，上級監督機關為適法性監督之際，固應尊重該地方自治團體所為合法

county or city, that is, specific events occurring within a specific prescient that fit into the consideration of proportionality are also included. The indefinite concept of law in the disputed provision leaves a certain degree of discretion to the authorized governing agency, since matters of local self-governance are different from matters being delegated from the governing agency. In the former situation, the agency's supervisory authority is confined only to the issue of legality, which is similar to the court's exercise of its investigatory power in an administrative litigation (See Article 79, Paragraph 3, of the Administrative Appeal Act). In the latter situation, in addition to the question of legality, the governing agency may exercise a comprehensive supervisory power over whether an administrative practice is in conformity with its objectives. As the present petition concerns both matters of local self-governance and the indefinite concepts of law, the governing agency should respect the judgment of legality by the local governing entity while also retaining the power to revoke or modify [that judgment or decision] in accordance

性之判斷，但如其判斷有恣意濫用及其他違法情事，上級監督機關尚非不得依法撤銷或變更。

with the law if it is rendered arbitrarily or capriciously or under other unlawful grounds.

The purpose of the Constitution in establishing a constitutional interpretation system is to authorize the constitutional interpretation body with the power of statutory review (See Article 78 of the Constitution). Except for those matters involving the [possible] dissolution of a political party due to its unconstitutional act, whose decision is to be rendered by the Constitutional Court consisting of all the Grand Justices (See Article 5, Paragraph 4, of the Additional Articles of the Constitution), such power does not cover the constitutionality or legality of a specific [administrative] disposition. In this petition, since the Executive Yuan's decision to override the holding to postpone the election of *li* executives by the Taipei Municipal Government touches on the fact findings of a specific case and statutory interpretation on the applicability of a national statute over local self-governance, it is considered a disposition that carries legal consequences, or an administrative

憲法設立釋憲制度之本旨，係授予釋憲機關從事規範審查（參照憲法第七十八條），除由大法官組成之憲法法庭審理政黨違憲解散事項外（參照憲法增修條文第五條第四項），尚不及於具體處分行為違憲或違法之審理。本件行政院撤銷台北市政府延期辦理里長選舉之決定，涉及中央法規適用在地方自治事項時具體個案之事實認定、法律解釋，屬於有法效性之意思表示，係行政處分，台北市政府有所不服，乃屬與中央監督機關間公法上之爭議，惟既屬行政處分是否違法之審理問題，為確保地方自治團體之自治功能，該爭議之解決，自應循行政爭訟程序處理。台北市如認行政院之撤銷處分侵害其公法人之自治權或其他公法上之利益，自得由該地方自治團體，依訴願法第一條第二項、行政訴訟法第四條提起救濟請求撤銷，並由訴願受理機關及行政法院就上開監督機關所為處分之適法性問題為終局之判斷。

disposition. This is, therefore, a public law dispute between the central government agency and a local government. As this petition indeed concerns the review of lawfulness of an administrative disposition, and has been initiated for the sake of preserving the self-governance function of local governing bodies, the resolution of such a dispute should naturally follow the administrative dispute resolution proceedings. As a result, if and when the Taipei Municipal Government considers that the Executive Yuan's revocation decision has encroached upon its self-governance power or other public law interests, it should file a grievance petition in accordance with Article 1, Paragraph 2, of the Administrative Appeal Act and Article 4 of the Administrative Procedure Act and request the agency and the Administrative Court having jurisdiction over the matter to render a final ruling on the legality of such an administrative disposition.

REASONING: The Taipei Municipal Government filed the present petition in accordance with Article 75, Paragraph 2, of the Local Government Sys-

解釋理由書：本件係台北市政府因決定延期辦理里長選舉，中央主管機關內政部認其決定違背地方制度法第八十三條第一項規定，經報行政院依同

tems Act, alleging that the central governing authority, the Ministry of the Interior and subsequently the Executive Yuan, erroneously relied on Article 75, Paragraph 1, of that act by revoking the municipality's decision to postpone the election of *li* executives for the reason that such a decision was in violation of Article 83 of the same act. Because the city of Taipei is a protected local self-governance entity under Article 118 of the Constitution and in light of the fact that this petition concerns the delineation of jurisdictional boundaries and the dispute resolution mechanism between the local and central governments, this petition is not just a mere dispute involving the interpretation of statutes among different government agencies, rather it has reached the constitutional level of correlations between the fundamental principles of democratic operations and jurisdictions of local self-governance. Hence, an interpretation is warranted. This petition concerns a local self-governance dispute between a local and the central government over the interpretation of the applicable national statutes, which does not fall within the

法第七十五條第二項予以撤銷；台北市政府不服，乃依同條第八項規定逕向本院聲請解釋。因台北市為憲法第一百十八條所保障實施地方自治之團體，且本件事關修憲及地方制度法制定後，地方與中央權限劃分及紛爭解決機制之釐清與確立，非純屬機關爭議或法規解釋之問題，亦涉及憲法層次之民主政治運作基本原則與地方自治權限之交錯，自應予以解釋。本件聲請屬地方政府依據中央法規辦理自治事項，中央與地方政府間對於中央法規之適用發生爭議，非屬本院釋字第五二七號解釋之範圍，本院依地方制度法第七十五條第八項受理其聲請，與該號解釋意旨無涉，合先敘明。

scope of J. Y. Interpretation No. 527 and has no bearing on that interpretation. The petition is hereby granted in accordance with Article 75, Paragraph 8, of the Local Government Systems Act.

Under Article 83, Paragraph 1, of the Local Government Systems Act, the so-called "special circumstances" can not possibly be fully illustrated by listing all specific events, and are generally referred to as unforeseeable, extraordinary events that result in special elections not being held at a legally mandated time. [It also refers to the situations where] sufficient evidence suggests that an improper outcome or clear and present danger may ensue, or may be contrary to the reasonable and necessary administrative purpose for the realization of local self-governance, if and when the election is to be held on time. Furthermore, "special circumstances" are limited to those that do not affect national jurisdiction or the entire jurisdictions within a county or city, that is, specific events occurring within a specific prescient that fit into the consideration of proportionality are also included.

地方制度法第八十三條第一項所謂特殊事故得延期辦理改選或補選，在概念上無從以固定之事故項目加以涵蓋，而係泛指不能預見之非尋常事故，致不克按法定日期改選或補選，或如期辦理有事實足認將造成不正確之結果或發生立即嚴重之後果或將產生與實現地方自治之合理及必要之行政目的不符等情形者而言。又特殊事故不以影響及於全國或某一縣市全部轄區為限，即僅於特定選區存在之特殊事故如符合比例原則之考量時，亦屬之。上開法條使用不確定法律概念，即係賦予該管行政機關相當程度之判斷餘地，蓋地方自治團體處理其自治事項與承中央主管機關之命辦理委辦事項不同，前者中央之監督僅能就適法性為之，其情形與行政訴訟中之法院行使審查權相似（參照訴願法第七十九條第三項）；後者得就適法性之外，行政作業之合目的性等實施全面監督。本件既屬地方自治事項又涉及不確定法律概念，上級監督機關為適法性監

The indefinite concept of law in the disputed provision leaves a certain degree of discretion to the authorized governing agency, since matters of local self-governance are different from matters being delegated from the governing agency. In the former situation, the agency's supervisory authority is confined only to the issue of legality, which is similar to the court's exercise of its investigatory power in an administrative litigation (See Article 79, Paragraph 3, of the Administrative Appeal Act). In the latter situation, in addition to the question of legality, the governing agency may exercise a comprehensive supervisory power over whether an administrative practice is in conformity with its objectives. As the present petition concerns both matters of local self-governance and indefinite concepts of law, the governing agency should respect the judgment of legality by the local governing entity while also retaining the power to revoke or modify [that judgment or decision] in accordance with the law if it is rendered arbitrarily or capriciously or under other unlawful grounds. Theoretically, there are several

督之際，固應尊重地方自治團體所為合法性之判斷，但如其判斷有恣意濫用及其他違法情事，上級監督機關尚非不得依法撤銷或變更。對此類事件之審查密度，揆諸學理有下列各點可資參酌：(一)事件之性質影響審查之密度，單純不確定法律概念之解釋與同時涉及科技、環保、醫藥、能力或學識測驗者，對原判斷之尊重即有差異。又其判斷若涉及人民基本權之限制，自應採較高之審查密度。(二)原判斷之決策過程，係由該機關首長單獨為之，抑由專業及獨立行使職權之成員合議機構作成，均應予以考量。(三)有無應遵守之法律程序？決策過程是否踐行？(四)法律概念涉及事實關係時，其涵攝有無錯誤？(五)對法律概念之解釋有無明顯違背解釋法則或牴觸既存之上位規範。(六)是否尚有其他重要事項漏未斟酌。又里長之選舉，固有例外情事之設計如地方制度法第五十九條第二項之遴聘規定，但里長之正常產生程序，仍不排除憲法民主政治基本原則之適用，解釋系爭事件是否符合「特殊事故」而得延辦選舉，對此亦應一併考量，方能調和民主政治與保障地方自治間之關係。本件因不確定法律概念之適用與上級監督機關撤銷之行政處分有不可分之關係，仍應於提

factors or reference points, which may help to determine the intensity (or level) of review (or scrutiny) for cases of this nature: (1) the nature of the issue. The degree of deference to the original decision over a simple, ambiguous legal concept can be different depending on whether the interpretation simultaneously involves science and technology, environmental protection, medical pharmacology, capability or aptitude tests. A higher level of scrutiny must be adopted if the [original] decision concerns the fundamental rights of the people; (2) whether the original decision-making process involves the head of the [authoritative] agency alone or a professional and independent committee resolution; (3) whether the decision-making process has fulfilled the necessary due process. (4) whether there is any error concerning the distinction as a matter of fact vis-à-vis a matter of law. (5) whether the interpretation of an indefinite concept of law clearly contradicts the rules of interpretation or norms of a higher hierarchy; and (6) whether [the decision] failed to take into consideration other important factors. While there is a

起行政訴訟後，由該管行政法院依照本解釋意旨並參酌各種情狀予以受理審判。

design for the appointment of *li* executives under exceptional circumstances such as that stated in Article 59, Paragraph 2, of the Local Government Systems Act, the normal procedure for the investiture of a *li* executive should not preclude the application of the fundamental democratic principles within the Constitution, and whether this dispute should qualify as a "special circumstance" for a postponed election is of no exception so that the balance between democratic governance and the protection of local self-governance can be maintained. As the application of the indefinite concept of law here is inseparable from the administrative disposition to revoke by the governing authoritative agency, the Administrative Court should accept [this case] and render its judgment in accordance with this interpretation while taking into consideration the totality of the circumstances, if and when an administrative action is brought.

This petition concerns a public law dispute with the authoritative central governing agency, with the Taipei Municipal

本件台北市政府對於行政院依地方制度法第七十五條第二項撤銷其延選決定，台北市政府有所不服，乃屬與中

Government challenging the Executive Yuan, which, in accordance with Article 75, Paragraph 2, of the Local Government Systems Act, revoked its decision to postpone the election [of *li* executives]. While this petition is permitted in accordance with Article 75, Paragraph 8, of the Local Government Systems Act, yet in light of the fact that this petition concerns the constitutionality or legality of a reversal of a decision by the central supervisory agency, the purpose of the Constitution in establishing a constitutional interpretation system is to authorize the constitutional interpretation body with the power of statutory review (See Article 78 of the Constitution). Except for those matters involving the [possible] dissolution of a political party due to its unconstitutional act, whose decision is to be rendered by the Constitutional Court consisting of all the Grand Justices (See Article 5, Paragraph 4, of the Additional Articles of the Constitution), such power does not cover the constitutionality or legality of a specific [administrative] disposition (See the Reasoning of J. Y. Interpretation No. 527). In this petition, since the Executive

央監督機關間公法上之爭議，雖得依地方制度法第七十五條第八項聲請本院解釋，然因係中央監督機關之撤銷處分違憲或違法之具體審理，衡諸憲法設立釋憲制度之本旨，係授予釋憲機關從事規範審查權限（參照憲法第七十八條），除由大法官組成之憲法法庭審理政黨違憲解散事項外（參照憲法增修條文第五條第四項），尚不及於具體處分違憲或違法之審理（本院釋字第五二七號解釋理由書參照）。本件行政院撤銷台北市政府延期辦理里長選舉之行為，係中央主管機關認有違法情事而干預地方自治團體自治權之行使，涉及中央法規適用在地方自治事項時具體個案之事實認定、法律解釋，屬於有法效性之意思表示，係行政處分，並非行政機關相互間之意見交換或上級機關對下級機關之職務上命令。上開爭議涉及中央機關對地方自治團體基於適法性監督之職權所為撤銷處分行為，地方自治團體對其處分不服者，自應循行政爭訟程序解決之。其爭訟之標的為中央機關與地方自治團體間就地方自治權行使之適法性爭議，且中央監督機關所為適法性監督之行為是否合法，對受監督之地方自治團體，具有法律上利益。為確保地方自治團體之自治功能，本件台北市之行政首長應

Yuan's decision to interfere with the exercise of local self-governance and override the Taipei Municipal Government's decision to postpone the election of li executives touches on the specific fact findings and statutory interpretations on the applicability of a national statute over the exercise of local self-governance, it is considered a disposition that carries legal consequences, or an administrative disposition instead of a mere exchange of viewpoints between administrative agencies or the authoritative agency giving an order to a subordinate agency. As such, the proper dispute resolution process for the local government is to engage in administrative litigation on the subject matter of legality over the exercise of local self-governance authority, the actions by the supervisory agency, and the legal interests towards the local government. In this petition, the chief executive of Taipei City shall represent that self-governing entity to present an administrative litigation challenging the legality of [the supervisory agency's] action and requesting the removal of that action in accordance with Article 1, Paragraph 2, and Article 4 of the Administra-

得代表該地方自治團體依訴願法第一條第二項、行政訴訟法第四條提起救濟請求撤銷，由訴願受理機關及行政法院就上開監督機關所為處分之適法性問題為終局之判斷，受訴法院應予受理。其向本院所為之釋憲聲請，可視為不服原行政處分之意思表示，不生訴願期間逾越之問題（參照本院院字第四二二號解釋及訴願法第六十一條），其期間應自本解釋公布之日起算。惟地方制度法關於自治監督之制度設計，除該法規定之監督方法外，缺乏自治團體與監督機關間之溝通、協調機制，致影響地方自治功能之發揮。從憲法對地方自治之制度性保障觀點，立法者應本憲法意旨，增加適當機制之設計。

tive Procedure Act. The proper agency and administrative court having jurisdiction over the petition shall receive the case and render judgment accordingly. The present petition may be considered as an objection to the original administrative action and the statute of limitation for administrative petition has not tolled (Cf. Yuan Tzu Interpretation No. 422 and Article 61 of the Administrative Appeal Act). The statute of limitation shall begin to run as of the date this Interpretation is publicly issued. Incidentally, even though the Local Government Systems Act provides mechanisms for communication and coordination, the failure of the local and supervisory governing agencies to implement such mechanisms in the current local self-governance system has negatively impacted the functionality of local governance. For the sake of constitutional protection over systematic local self-governance, the legislature ought to strengthen the proper mechanism in accordance with the meaning and purpose of the Constitution.

With regard to the petitioner's asser-

本件聲請意旨另指地方制度法第

tion that Article 75, Paragraph 2, of the Local Government Systems Act is likely to be unconstitutional, it is denied for review as this portion of the petition is not in conformity with Article 5, Paragraph 1, of the Constitutional Interpretation Procedure Act; furthermore, the petition for uniform interpretation is related to those already being interpreted and shall not be further reviewed.

七十五條第二項有違憲疑義，核與司法院大法官審理案件法第五條第一項要件不符；又聲請統一解釋與已解釋部分有牽連關係，均不另為不受理之諭知，併此指明。

Justice Chi-Nan Chen filed concurring opinion.

Justice Sen-Yen Sun filed concurring opinion.

Justice Tong-Schung Tai filed concurring opinion.

Justice Jyun-Hsiung Su filed concurring opinion.

Justice Hua-Sun Tseng filed dissenting opinion in part.

Justice Tieh-Cheng Liu filed dissenting opinion.

Justice Tsay-Chuan Hsieh filed dissenting opinion.

本號解釋陳大法官計男、孫大法官森焱、戴大法官東雄及蘇大法官俊雄分別提出協同意見書；曾大法官華松提出部分不同意見書；劉大法官鐵錚、謝大法官在全分別提出不同意見書。

J. Y. Interpretation No.554（December 27, 2002）*

ISSUE: While every person is entitled to the freedom of sexual behavior, may such freedom be restricted by law in order to maintain the system of marriage and family, and is it constitutional to make the act of adultery punishable under the criminal law?

RELEVANT LAWS:

Articles 22 and 23 of the Constitution（憲法第二十二條、第二十三條）; J. Y. Interpretation Nos. 362 and 552（司法院釋字第三六二號、第五五二號解釋）; Articles 239 and 245, Paragraphs 1 and 2 of the Criminal Code（刑法第二百三十九條、第二百四十五條第一項、第二項）.

KEYWORDS:

marriage（婚姻）, family system（家庭制度）, freedom of personality（人格自由）, order of human relationship（人倫秩序）, gender equality（男女平等）, freedom of sexual behavior（性行為自由）, adultery（通姦）, spouse（配偶）, the other party to the adultery（相姦者）, value judgment（價值判斷）, principle of proportionality（比例原則）, community of living（生活共同體）, relationship of lifetime association（永久結合關係）, indictable only upon complaint（告訴乃論）, matrimonial cohabitation（婚姻共同生活；夫妻同居）.**

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* Translated by Raymond T. Chu.

** Contents within frame, not part of the original text, are added for reference purpose only.

HOLDING: Marriage and family serve as the foundation on which our society takes its shape and develops and are thus institutionally protected by the Constitution (See Interpretations Nos. 362 and 552). The root of our marriage system lies in the freedom of personality, with such social functions as the maintenance of the order of human relationships and gender equality, and the raising of children. To insure an enduring and unimpaired system of marriage, the state may of course enact relevant rules to require the husband and the wife to be mutually bound to each other by the duty of faithfulness. The freedom of sexual behavior is inseparably related with the personality of individuals, and every person is free to decide whether or not and with whom to have sexual affairs. Such freedom is, however, legally protected only if it is not detrimental to the social order or public interest as it is so provided in Article 22 of the Constitution. Thus, the freedom of sexual behavior is subject to the restriction put on it by marriage and the family system.

解釋文：婚姻與家庭為社會形成與發展之基礎，受憲法制度性保障（參照本院釋字第三六二號、第五五二號解釋）。婚姻制度植基於人格自由，具有維護人倫秩序、男女平等、養育子女等社會性功能，國家為確保婚姻制度之存續與圓滿，自得制定相關規範，約束夫妻雙方互負忠誠義務。性行為自由與個人之人格有不可分離之關係，固得自主決定是否及與何人發生性行為，惟依憲法第二十二條規定，於不妨害社會秩序公共利益之前提下，始受保障。是性行為之自由，自應受婚姻與家庭制度之制約。

What type of restriction, if any, must

婚姻關係存續中，配偶之一方與

be imposed on sexual affairs between a married person and a third party during the subsistence of a marriage and whether or not an act in violation of such restriction should be made punishable as a crime are problems that must be weighed and determined by the legislature by taking into consideration the customs of the country, which vary between nations. While the Criminal Code, by providing in Article 239 that a person who commits adultery and the other party to the adultery are punishable with imprisonment for not more than one year, imposes a restriction on the freedom of sexual behavior, such restriction is essential in order to safeguard marriage, the family system, and the social order. To avoid overly severe restrictions, however, the Code establishes certain ancillary conditions on the prosecution of the offense of adultery by setting forth in Article 245, Paragraph 1, that the offense is indictable only upon complaint, and in Paragraph 2 of the same Article that no complaint may be instituted if the spouse has connived at or forgiven his wife or her husband for the offense. These statutes are reflective of the

第三人間之性行為應為如何之限制，以及違反此項限制，應否以罪刑相加，各國國情不同，應由立法機關衡酌定之。刑法第二百三十九條對於通姦者、相姦者處一年以下有期徒刑之規定，固對人民之性行為自由有所限制，惟此為維護婚姻、家庭制度及社會生活秩序所必要。為免此項限制過嚴，同法第二百四十五條第一項規定通姦罪為告訴乃論，以及同條第二項經配偶縱容或宥恕者，不得告訴，對於通姦罪附加訴追條件，此乃立法者就婚姻、家庭制度之維護與性行為自由間所為價值判斷，並未逾越立法形成自由之空間，與憲法第二十三條比例原則之規定尚無違背。

value judgment made by the lawmakers to balance the preservation of the systems of marriage and family against the freedom of sexual behavior, and do not go beyond the sphere of discretion of the legislative power nor are they in conflict with the principle of proportionality embodied in Article 23 of the Constitution.

REASONING: Marriage and family serve as the foundation on which our society takes its shape and develops and are thus institutionally protected by the Constitution (See Interpretations Nos. 362 and 552). The root of our marriage system lies in the freedom of personality, with such social functions as the maintenance of the order of human relationships and gender equality, and the raising of children. To insure an enduring and unimpaired system of marriage, the state may of course enact rules to require the husband and the wife to be mutually bound to each other by the duty of faithfulness. The freedom of sexual behavior is inseparably related with the personality of individuals, and every person is free to decide whether or not and with whom to have sexual af-

解釋理由書：婚姻與家庭為社會形成與發展之基礎，受憲法制度性保障（參照本院釋字第三六二號、第五五二號解釋）。婚姻制度植基於人格自由，具有維護人倫秩序、男女平等、養育子女等社會性功能，國家為確保婚姻制度之存續與圓滿，自得制定相關規範，約束夫妻雙方互負忠誠義務。性行為自由與個人之人格有不可分離之關係，固得自主決定是否及與何人發生性行為，惟依憲法第二十二條規定，於不妨害社會秩序公共利益之前提下，始受保障。是性行為之自由，自應受婚姻與家庭制度之制約。

fairs. Such freedom is, however, legally protected only if it is not detrimental to the social order or public interest as it is so provided in Article 22 of the Constitution. Thus, the freedom of sexual behavior is subject to the restriction put on it by marriage and the family system.

Marriage means a living agreement where a husband and a wife mutually engage with each other to live their lives together so that both may realize and develop their respective personalities. The relation of a lifetime association formed by marriage not only unites the husband and the wife in a relationship of mutual support and reliance in spirit and material but also is enlarged to serve as a foundation for families and the society. As regards the type of restriction, if any, that must be imposed on sexual affairs between a married person and a third party during the subsistence of a marriage and whether or not an act in violation of such restriction should be made punishable as a crime, the problems must be dealt with by the norms of conduct to be determined by the legislature by taking into considera-

按婚姻係一夫一妻為營永久共同生活，並使雙方人格得以實現與發展之生活共同體。因婚姻而生之此種永久結合關係，不僅使夫妻在精神上、物質上互相扶持依存，並延伸為家庭與社會之基礎。至於婚姻關係存續中，配偶之一方與第三人間之性行為應為如何之限制，以及違反此項限制，應否以罪刑相加，因各國國情不同，立法機關於衡酌如何維護婚姻與家庭制度而制定之行為規範，如選擇以刑罰加以處罰，倘立法目的具有正當性，刑罰手段有助於立法目的達成，又無其他侵害較小亦能達成相同目的之手段可資運用，而刑罰對基本權利之限制與立法者所欲維護法益之重要性及行為對法益危害之程度，亦處於合乎比例之關係者，即難謂與憲法第二十三條規定之比例原則有所不符。

tion how marriages and the family system should be protected in light of the customs of the country, which vary from nation to nation. If the legislature chooses to make such an act punishable under criminal law and considers that criminal punishment will be helpful to the achievement of justifiable legislative purposes, and that there is available no other alternative means to attain the same purposes with less harm, the law should not be deemed to be inconsistent with the principle of proportionality embodied in Article 23 of the Constitution insofar as the restriction imposed by criminal punishment on the fundamental right is proportional to the importance of the legal interest intended by the lawmakers to be placed under protection and the degree of detriment to be caused by the act to the legal interest.

The cornerstone supporting matrimonial cohabitation is unquestionably the relationship between the husband and wife established upon the affection and faithfulness toward each other. With no better alternative means, the law adopts a criminal punishment approach to the en-

婚姻共同生活基礎之維持，原應出於夫妻雙方之情感及信賴等關係，刑法第二百三十九條規定：「有配偶而與人通姦者，處一年以下有期徒刑，其相姦者，亦同。」以刑罰手段限制有配偶之人與第三人間之性行為自由，乃不得已之手段。然刑法所具一般預防功能，

forcement of a restriction on the freedom of sexual behavior between married persons and others by providing in Article 239 of the Criminal Code that “a married person who commits adultery with another shall be punished with imprisonment for not more than one year; the other party to the adultery shall be liable to the same punishment.” In a sense, the general preventive function of the criminal law is particularly effective in making the husband and wife adhere to their duty of loyalty and faithfulness to one another so that such duty may become the fundamental norm of social life and may, furthermore, promote the people’s legal consciousness of regarding marriage highly and safeguarding the ethical value of marriage and the family system. To the extent that the judgment made by the legislature on the duty of loyalty and faithfulness between husband and wife is not contrary to the general concept of the general populace and that the people’s observance of such norms of duty is not beyond expectation, the legislature may certainly resort to criminal punishment for the legislative purposes of preventing the offense of

於信守夫妻忠誠義務使之成為社會生活之基本規範，進而增強人民對婚姻尊重之法意識，及維護婚姻與家庭制度之倫理價值，仍有其一定功效。立法機關就當前對夫妻忠誠義務所為評價於無違社會一般人通念，而人民遵守此項義務規範亦非不可期待之情況下，自得以刑罰手段達到預防通姦、維繫婚姻之立法目的。矧刑法就通姦罪處一年以下有期徒刑，屬刑法第六十一條規定之輕罪；同法第二百四十五條第一項規定，通姦罪為告訴乃論，使受害配偶得兼顧夫妻情誼及隱私，避免通姦罪之告訴反而造成婚姻、家庭之破裂；同條第二項並規定，經配偶縱容或宥恕者，不得告訴，對通姦罪追訴所增加訴訟要件之限制，已將通姦行為之處罰限於必要範圍，與憲法上開規定尚無牴觸。

adultery and protecting marital relations. Besides, the penalty of imprisonment for one year or less for adultery under the Criminal Code makes the act a minor offense under Article 61 thereof; Paragraph 1 of Article 245 of the Code makes the offense of adultery indictable only upon complaint, thus giving the injured spouse the opportunity to take into consideration the affection between the husband and the wife and their privacy so as to avoid the possibility of family breakup in consequence of the institution of a complaint on the ground of adultery; and under Paragraph 2 of the same Article the spouse is debarred from filing a complaint if he or she has connived at or has forgiven the other party for the act. These statutes have set a limit on punishment for adultery to an essential degree by requiring additional prerequisites for prosecution of the offense, and are thus not in conflict with Article 23 of the Constitution.

J. Y. Interpretation No.555（January 10, 2003）*

ISSUE: Are the Enforcement Rules of the Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law in conflict with the Constitution and the enabling Act in restricting the scope of application of the enabling statute to the public officials, who receive remuneration under the organic law of relevant bodies, and thus excluding the military officers, political officials and contracted personnel?

RELEVANT LAWS:

Articles 7 and 86 of the Constitution（憲法第七條、第八十六條）; Article 3, Paragraph 1, Subparagraphs 2 and 4, Paragraph 5 of the Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law（戒嚴時期人民受損權利回復條例第三條第一項第二款、第四款、第五項）; Articles 3, Paragraph 1, and 6 of the Enforcement Rules of the Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law（戒嚴時期人民受損權利回復條例施行細則第三條第一項、第六條）; Public Functionaries Appointment Act（公務人員任用法）.

KEYWORDS:

ordinary public officers（常業文官）, public servants（公務人員）, government employees（公職人員）, public officials（文職人員）, military officers（武職人員）, rebellion（內亂罪）, treason（外患罪）, retirement annuity（退休金）, principle of equality（平等原則）.**

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* Translated by Wei-Feng Huang of THY Taiwan International Law Offices.

** Contents within frame, not part of the original text, are added for reference purpose only.

HOLDING: The scope of application of Article 3 of the Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law, and in particular, its definition of public servants, is related to the various terminologies adopted by legislations of this State to refer to public servants. According to the provisions in Article 86 of the Constitution and the Public Functionaries Appointment Act, reference to "public servants" means those who are qualified by law for government employment through examination and have titles or are ranked in the approved institutes. Under the current system of law, public servants are defined to mean ordinary public officers, thus excluding military officers. Article 3, Paragraph 1, of the Enforcement Rules of the Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law stipulates: "Reference to public servants in Article 3, Paragraph 1, Subparagraph 2, of this Act means public officials, with the exclusion of political appointees, publicly elected officials and contracted employees of the government, who receive

解釋文：戒嚴時期人民受損權利回復條例第三條規定之適用範圍，其中關於公務人員涵義之界定，涉及我國法制上對依法令從事公務之人員使用不同名稱之解釋問題。依憲法第八十六條及公務人員任用法規定觀之，稱公務人員者，係指依法考選銓定取得任用資格，並在法定機關擔任有職稱及官等之人員。是公務人員在現行公務員法制上，乃指常業文官而言，不含武職人員在內。戒嚴時期人民受損權利回復條例施行細則第三條第一項規定：「本條例第三條第一項第二款所稱公務人員，指各機關組織法規中，除政務官、民選人員及聘僱人員外，受有俸（薪）給之文職人員」，係對該條例第三條第一項第二款所稱「任公務人員、教育人員及公職人員之資格」中有關公務人員涵義之界定，不包括武職人員，乃基於事物本質之差異，於平等原則無違，亦未逾越母法之授權，與憲法規定尚無牴觸。至任武職人員之資格應否回復，為立法機關裁量形成範圍，併此敘明。

remuneration under the regulations of the relevant bodies." It further refines the definition of public servants referred to in Article 3, Paragraph 1, Subparagraph 2, of the said Act which states: "qualification of public servants, education personnel and government employees." Such definition does not include military officers due to their difference in nature, and is not in contradiction with the principle of equality, nor does it exceed the authority granted by the empowering statute or infringe upon the Constitution. The question as to whether the rights of military officers should be reinstated is within the scope of the legislative body's determination.

REASONING: The scope of application of Article 3 of the Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law, in particular, its definition of public servants, is related to the various terminologies adopted by legislations of this State to refer to public servants. According to the provisions in Article 86 of the Constitution and the Public Functionaries

解釋理由書：戒嚴時期人民受損權利回復條例第三條規定之適用範圍，其中關於公務人員涵義之界定，涉及我國法制上對依法令從事公務之人員使用不同名稱之解釋問題。又依憲法第八十六條及公務人員任用法規定觀之，稱公務人員者，係指依法考選銓定取得任用資格，並在法定機關擔任有職稱及官等之人員。現行與公務員有關之法規，凡使用公務人員名稱者，包括上開

Appointment Act, reference to "public servants" means those who are qualified by law for government employment through examination and have titles or are ranked in the approved institutes. The existing legislations concerning public servants and referring to public servants in their titles, including the abovementioned Public Functionaries Appointment Act, Public Functionaries Remuneration Act, Public Functionaries Protection Act, Act Governing the Promotion of Public Functionaries, Public Functionaries Merit Evaluation Act, Public Functionaries Retirement Act, Act Governing the Payment of Compensation to Surviving Dependents of Public Functionaries, shall not apply to military officers. Under the current system of law, public servants are defined to mean ordinary public officials, excluding military officers. Article 3, Paragraph 1, of the Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law stipulates: "People who had been convicted of rebellion and/or treason during the period of martial law, sent to a prosecutor, or were subject to warrants of reformatory, prosecuted by

公務人員任用法，以及公務人員俸給法、公務人員保障法、公務人員陞遷法、公務人員考績法、公務人員退休法、公務人員撫卹法等，均不適用於武職人員。是公務人員在現行公務員法制上，乃指常業文官（或稱常任文官）而言，不含武職人員在內。戒嚴時期人民受損權利回復條例第三條第一項規定：「人民於戒嚴時期，因犯內亂罪、外患罪，經裁判確定、或交付感化、或提起公訴、或通緝有案尚未結案而喪失或被撤銷之下列資格，有向將來回復之可能者，得由當事人申請主管機關，依有關法令處理之，其經准許者，溯自申請之日起生效：一、公務人員暨專門職業及技術人員考試及格之資格。二、任公務人員、教育人員及公職人員之資格。三、專門職業及技術人員執業之資格。四、為撫卹金、退休金或保險金領受人之資格」，乃對人民於戒嚴時期，因犯內亂罪、外患罪所喪失或被撤銷之各種資格，於符合一定要件下，得申請回復之規定。其第二款所規定之「公務人員」，與教育人員、公職人員並列，參照前述說明，其適用範圍限定於文職人員，不包括武職人員在內，與第四款規定回復領受撫卹金、退休金或保險金之資格，不限於文職人員者有別，同條第

a public arrest, and had thus lost or been disqualified of the following qualifications, which may be restituted retrospectively in accordance with the law, upon application to the relevant authorities by the parties concerned: 1) successful completion of the public servants, specialists or technicians examination, 2) employment qualification for public servants, education personnel or government employees, 3) specialists and technicians' practicing permit, and 4) qualifying beneficiaries of financial assistance, retirement or insurance annuity." The provision permits the individuals who have lost or been disqualified of their various qualifications during the period of martial law, for reasons of having committed offences of rebellion and/or treason, to apply for restitution of their qualifications when certain conditions are met. Reference to "public servants" in Subparagraph 2 above means education personnel and government employees, and its scope of application is limited to public officials with the exclusion of military officers. This is different from Subparagraph 4 which provides for the restitution of qualifications for receiv-

五項係僅就文職人員回復該等資格所為之規定，並未排除武職人員回復此等資格之權利，該條例施行細則第六條「本條例第三條第一項第四款所稱退休金，包括公務人員、教育人員之一次退休金、月退休金及軍人之退休俸、生活補助費、退伍金、贍養金」，即係本此意旨而為規定。

ing financial assistance, retirement or insurance annuity, and is not restricted to public officials. Paragraph 5 of the same Article provides for the restitution of the said qualification for public officials without denying military officials such rights. Article 6 of the Enforcement Rules of the said Act, in an attempt to achieve the aforementioned purpose, provides: "Reference to pension in Article 3, Paragraph 1, Subparagraph 4, of this Act covers the lump sum and monthly retirement payments to public servants and education personnel, and the retirement wage, sustenance allowance, after-service annuity and maintenance payment to military officials."

Article 3, Paragraph 1, of the Enforcement Rules of the said Act stipulates: "Reference to public servants in Article 3, Paragraph 1, Subparagraph 2, of this Act means "public officials," with the exclusion of political appointees, publicly elected officials and contracted employees of the government, who receive remuneration under the regulations of the relevant bodies." It further refines the defini-

戒嚴時期人民受損權利回復條例施行細則第三條第一項規定：「本條例第三條第一項第二款所稱公務人員，指各機關組織法規中，除政務官、民選人員及聘僱人員外，受有俸（薪）給之文職人員」，係對該條例第三條第一項第二款「任公務人員、教育人員及公職人員之資格」中有關公務人員涵義之界定，不包括武職人員，乃因其從事戰鬥行為或其他與國防相關之任務，攸關國

tion of public servants referred to in Article 3, Paragraph 1, Subparagraph 2, of the said Act which states: “qualification of public servants, education staff and government employees.” Such definition does not cover military officers because their combat and other national defense-related missions are vital to the State’s national security and military needs. In addition, the training, age limitations for employment qualifications, conditions for promotion and duties to observe rules imposed on military officers are different from those of public officials. The definition has taken into consideration the difference in the nature of their services, and is not in contradiction with the principle of equality, nor does it exceed the authority granted by the empowering statute or infringe upon the Constitution. The question as to whether the rights of military officers should be reinstated is within the scope of the legislative body’s determination.

家安全及軍事需要，且該等人員之養成過程、官階任用資格之年齡限制、陞遷條件及服從之義務等均與文職人員有別，是基於事物本質之差異，於平等原則無違，亦未逾越母法之授權，與憲法規定尚無牴觸。至任武職人員之資格應否回復，為立法機關裁量形成範圍，併此敘明。

J. Y. Interpretation No.556（January 24, 2003）*

ISSUE: Shall a member of a criminal syndicate be deemed to be continuously participating in the syndicate under the Organized Crime Prevention Act as ruled in J. Y. Interpretations Nos. 68 and 129, if he voluntarily surrenders himself to the authorities before his act of participation is discovered or has had no contact with the syndicate or has not participated in syndicate activities for a long time, with sufficient evidence to prove that he has positively broken away from the criminal syndicate, or shall the said Interpretations be overruled?

RELEVANT LAWS:

J. Y. Interpretation Nos. 68 and 129（釋字第六十八號、釋字第一二九號解釋）; J. Y. Interpretation Yuan-Tze No. 667（司法院院字第六六七號解釋）; Articles 3, Paragraphs 1 and 2, 18, Paragraph 1 of the Organized Crime Prevention Act（組織犯罪防制條例第三條第一項及第二項、第十八條第一項）; Betrayers Punishment Act（懲治叛亂條例）; Articles 2 and 154 of the Criminal Code（刑法第二條、第一百五十四條）; Decrees for Amnesty and Punishment Reduction of Criminals（罪犯赦免減刑令）.

KEYWORDS:

criminal syndicate（犯罪組織）, organized crime（組織活

* Translated by Raymond T. Chu.

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動）, criminal activities of an organized pattern（組織型態之犯罪活動）, voluntary surrender to the authorities（自首）, interim period（過渡期間）, burden of proof（舉證責任）, limitation period of prosecution（追訴時效）, amnesty（赦免）, reduction of punishment（減刑）, punishable act（可罰性之行為）, disband（解散組織）, excused/excusable from punishment（免除其刑）, make a fresh start（自新）, retroactive application（溯及適用）.**

HOLDING: The existence of criminal syndicates poses a potential threat of harm to the legal interest protected by law, and must, of course, be prevented and eliminated. The purposes of the Organized Crime Prevention Act are to maintain the social order and safeguard the legal interest of individuals by means of preventing and restraining criminal activities of an organized pattern. The term "participation in a criminal syndicate" used in Article 3, Paragraphs 1 and 2, of the Act denotes that to constitute the offense it is sufficient that one joins a criminal syndicate and becomes a member thereof, regardless of whether or not he participates in any activity of the syndic-

解釋文：犯罪組織存在，法律所保護之法益，即有受侵害之危險，自有排除及預防之必要。組織犯罪防制條例乃以防制組織型態之犯罪活動為手段，達成維護社會秩序及保障個人法益之目的。該條例第三條第一項及第二項所稱之參與犯罪組織，指加入犯罪組織成為組織之成員，而不問參加組織活動與否，犯罪即屬成立，至其行為是否仍在繼續中，則以其有無持續參加組織活動或保持聯絡為斷，此項犯罪行為依法應由代表國家追訴犯罪之檢察官負舉證責任。若組織成員在參與行為未發覺前自首，或長期未與組織保持聯絡亦未參加活動等事實，足以證明其確已脫離犯罪組織者，即不能認其尚在繼續參與。本院釋字第六十八號解釋前段：「凡曾

cate. Whether such an act is in a continuous state is determined by the fact of whether he continuously participates in activities of the syndicate or maintains contact with the syndicate. The burden of proof of this criminal act lies legally with the prosecutor that represents the state in the prosecution of crimes. Where a syndicate member voluntarily surrenders himself to the authorities before his act of participation is discovered or has had no contact with the syndicate or has not participated in syndicate activities for a long time, with sufficient evidence to prove that he has positively broken away from the criminal syndicate, he should no longer be considered to be continuously participating in the syndicate. The first sentence of this Yuan's Interpretation No. 68, which is intended to explicate the Betrayers Punishment Act, quotes: "A person who participated in a rebel organization shall certainly be deemed to be continuously participating in the organization before he voluntarily surrenders himself to the authorities or where there is no evidence to prove that he has definitely broken away from the organization." Now

參加叛亂組織者，在未經自首或有其他事實證明其確已脫離組織以前，自應認為係繼續參加」，係針對懲治叛亂條例所為之釋示，茲該條例已經廢止，上開解釋併同與該號解釋相同之本院其他解釋（院字第六六七號、釋字第一二九號解釋），關於參加犯罪組織是否繼續及對舉證責任分擔之釋示，與本件解釋意旨不符部分，應予變更。又組織犯罪防制條例第十八條第一項所為過渡期間之規定，其適用並未排除本解釋前開意旨，與憲法保障人身自由之規定並無牴觸。

that this Act has been repealed, the above-cited Interpretation together with other similar interpretations delivered by this Yuan, namely Interpretation Yuan-Tze No. 667 and Interpretation No. 129, must be overruled to the extent that any part thereof is inconsistent with the purpose of our holding here in respect of whether the act of participation in a criminal syndicate is continuous and the share of the burden of proof. Furthermore, the provision of Article 18, Paragraph 1, of the Organized Crime Prevention Act with respect to the interim period does not preclude the application of this Interpretation in line with the foregoing purpose, and is not contrary to the Constitution in the protection of the physical freedom of the people.

REASONING: An organized crime committed by a syndicate of a cliquey, habitual, and coercive or violent nature with the commitment of crimes as its goal or employing its members to commit crimes is entirely different from an ordinary act of crime in that it poses a comparatively greater threat to the social order and the people's rights and interest

解釋理由書：以犯罪為宗旨或以其成員從事犯罪活動具有集團性、常習性及脅迫性或暴力性之組織，其從事之組織犯罪，與通常之犯罪行為迥異，對社會秩序、人民權益侵害之危險性，尤非其他犯罪行為可比，自有排除及預防之必要，此為中華民國八十五年十二月十一日公布組織犯罪防制條例之所由設。但組織係一抽象組合，其本不可能

than other crimes do, and must, of course, be restricted and eliminated. This is the purpose for which the Organized Crime Prevention Act, promulgated on December 11, 1996, is enacted. A syndicate, however, is an abstract association incapable of doing any act or taking any action by itself, its criminal objectives and activities being carried out through the participation of its members. The term "participation in a criminal syndicate" used in the Act denotes that to constitute the offense it is sufficient that one joins a criminal syndicate and becomes a member thereof, regardless of whether or not he participates in any activity of the syndicate. Whether such an act is in a continuous state before the statute of limitations of prosecution expires is determined by the fact of whether he continuously participates in activities of the syndicate or maintains contact with the syndicate. The burden of proof of this criminal act lies legally with the prosecutor that represents the state in the prosecution of crimes. Where a syndicate member voluntarily surrenders himself to the authorities before his act of participation is discovered

有任何行為或動作，犯罪宗旨之實施或從事犯罪活動皆係由於成員之參與。該條例所稱參與犯罪組織，指加入犯罪組織成為組織之成員，而不問參加組織活動與否，犯罪即屬成立，至其行為於追訴權時效完成前是否仍在繼續中，則以其有無持續參加組織活動或保持聯絡為斷，此項犯罪行為依法應由代表國家追訴犯罪之檢察官負舉證責任。若組織成員在參與行為未發覺前自首，或長期未與組織保持聯絡亦未參加活動等事實，足以證明其確已脫離犯罪組織者，即不能認其尚在繼續參與狀態。相關之追訴時效自應分別情形自加入、最後參加活動或脫離組織時起算。本院釋字第六十八號解釋：「凡曾參加叛亂組織者，在未經自首或有其他事實證明其確已脫離組織以前，自應認為係繼續參加。如其於民國三十八年六月二十一日懲治叛亂條例施行後仍在繼續狀態中，則因法律之變更並不在行為之後，自無刑法第二條之適用。至罪犯赦免減刑令原以民國三十五年十二月三十一日以前之犯罪為限，如在以後仍在繼續犯罪中，即不能援用。」係就參加叛亂組織是否繼續所為解釋，茲該條例已於八十年五月十七日廢止，上開解釋併同與該號解釋相同之本院其他解釋（院字第六六七號、釋

or has had no contact with the syndicate or has not participated in syndicate activities for a long time, with sufficient evidence to prove that he has positively broken away from the criminal syndicate, he should no longer be considered to be continuously participating in the syndicate. The relevant statute of limitations of prosecution should naturally begin to run from either the time of joining the syndicate or of last taking part in syndicate activities or the time of breaking away from the syndicate, as the case may be. Interpretation No. 68, which is intended to explicate the Betrayers Punishment Act, quotes: "A person who participated in a rebel organization shall certainly be deemed to be continuously participating in the organization before he voluntarily surrenders himself to the authorities or where there is no evidence to prove that he has definitely broken away from the organization. Where an act is in a continuous state after the Betrayers Punishment Act became effective on June 21, 1949, Article 2 of the Criminal Code is not applicable because the change of law did not occur after the commission of the

字第一二九號解釋），關於參加犯罪組織是否繼續及對舉證責任分擔之釋示，與本件解釋意旨不符部分，應予變更。至其參加組織活動而另犯組織犯罪防制條例以外之罪者，則應依同條例第五條規定處理，乃屬當然。

act; nor can the Decrees for Amnesty and Punishment Reduction of Criminals, which is applicable only to crimes committed before December 31, 1945, be invoked if the commission of the criminal act is in continuation thereafter." Now that this Act has been repealed, the above-cited Interpretation together with other similar interpretations delivered by this Yuan, namely Interpretation Yuan-Tze No. 667 and Interpretation No. 129, must be overruled to the extent that any part thereof is inconsistent with the purpose of our holding here in respect of whether the act of participation in a criminal syndicate is continuous and the share of the burden of proof. It goes without saying that a person who, while participating in activities of a syndicate, commits a crime other than those specified by the Organized Crime Prevention Act, must be dealt with in pursuance of Article 5 of said Act.

Participation in a criminal syndicate is a punishable act (See Article 154 of the Criminal Code). The Organized Crime Prevention Act provides in Article 18, Paragraph 1, which quotes: "A member of

參與犯罪組織係屬可罰性之行為（參照刑法第一百五十四條），組織犯罪防制條例第十八條第一項：「本條例施行前已成立之犯罪組織，其成員於本脫離該組織，並向警察機關登記者，免

a criminal syndicate formed before this Act comes into force who breaks away from the syndicate within two months after this Act comes into force without being found to have committed any crime and registers with the police authorities is exempted from punishment. The same applies where the person who founded, took charge of, controlled, or directed a syndicate disbands the same within two months after this Act comes into force without being found to have committed any crime and registers with the police authorities." The purpose of this Act is to encourage syndicate participants to make a fresh start. The interim period therein provided is also intended to avoid unconditional and arbitrary retroactive application of the law. Furthermore, the provision of said Article with respect to the determination of the act of syndicate members participating in the syndicate does not preclude the application of this Interpretation in line with its purpose stated above, and is not contrary to the Constitution in the protection of the physical freedom of the people.

條例施行後二個月內，未發覺犯罪前，除其刑。其發起、主持、操縱或指揮者於本條例施行後二個月內，未發覺犯罪前，解散該組織，並向警察機關登記者，亦同。」旨在鼓勵參與犯罪組織者之自新，其過渡期間之設，復有避免無條件逕為溯及之適用，且該條對成員參與犯罪組織行為之認定，未排除本解釋前開意旨之適用，與憲法保障人身自由之規定並無牴觸。

J. Y. Interpretation No.557（March 7, 2003）*

ISSUE: Are the directives issued by the Executive Yuan constitutional in prescribing that the government employees who might be permitted to continue to occupy the public housing units allotted to them as living quarters after retirement shall be restricted to those who were appointed and retired in accordance with the Public Functionaries Appointment Act and Public Functionaries Retirement Act?

RELEVANT LAWS:

J. Y. Interpretation No.270（司法院釋字第二七〇號解釋）; Article 33 of the Public Functionaries Appointment Act（公務人員任用法第三十三條）; Article 2 of the Public Functionaries Retirement Act（公務人員退休法第二條）; Article 2 of the Enforcement Rules of the Public Functionaries Retirement Act（公務人員退休法施行細則第二條）; Management Guidelines（事務管理規則）.

KEYWORDS:

state-owned enterprise（公營事業機構）, expedient measures（權宜措施）, The Taiwan Tobacco and Monopoly Bureau（臺灣省菸酒公賣局）, appointment（任用）, retirement（退休）, boarding house（宿舍）.**

* Translated by Wei-Feng Huang of THY Taiwan International Law Offices.

** Contents within frame, not part of the original text, are added for reference purpose only.

HOLDING: The provision of public housing units for employees during their period of employment by administrative agencies, public schools or state-owned enterprises, in order to guarantee a standard living condition to their employees, is within their asset management authority under the regulations of the organization. Although employees who have left their positions, due to retirement or transfer, should vacate such housing they have been occupying, they may be permitted to continue such occupation as an expedient measure by the government to look after the welfare of such employees. To perform its duties as the highest executive organ of the State and determine the distribution of the State's limited resources, the Executive Yuan may proclaim relevant rules as are necessary and reasonable, taking into consideration the differences between the Government Employees and Teachers Appointment Act and the State-owned enterprise Employees Appointment Act and their remuneration structures.

解釋文：行政機關、公立學校或公營事業機構，為安定現職人員生活，提供宿舍予其所屬人員任職期間居住，本屬其依組織法規管理財物之權限內行為；至因退休、調職等原因離職之人員，原應隨即歸還其所使用之宿舍，惟為兼顧此等人員生活，非不得於必要時酌情准其暫時續住以為權宜措施。行政院基於全國最高行政機關之職責，盱衡國家有限資源之分配，依公教人員、公營事業機構服務人員任用法規、俸給結構之不同，自得發布相關規定為必要合理之規範，以供遵循。

The Executive Yuan Order Tai-Zen-

行政院於中華民國四十九年十二

Ji (49) No.6719 of December 1, 1960, permitted retired officials to reside in their public housing units until the Measures Governing Residential Placement of Retired Officials were proclaimed. Order Tai-Zen-Ji (56) No.8053 of October 12, 1967, restricted the phrase "retired officials" referred to in the aforementioned Order to public servants appointed pursuant to the law and to public servants who have applied for retirement in accordance with the Public Functionaries Retirement Act. Letter (74) Ren-Chung (4) No.14927 dated May 18, 1985, which stated that: the statements regarding the allotment of public housing units prior to the amendment of the Management Guidelines, and regarding the permission granted to retired officials to continue their occupation of such housing after the amendment of the said Guidelines until the public housing units are re-allotted do not alter the scope of application of the abovementioned Letter to retired officials. The Taiwan Tobacco and Wine Monopoly Bureau is a state-owned enterprise. Its employees are not appointed in accordance with the Public Functionaries Appointment Act and

月一日以台四十九人字第六七一九號令，准許已退休人員得暫時續住現住宿舍，俟退休人員居住房屋問題處理辦法公布後再行處理。繼於五十六年十月十二日以台五十六人字第八〇五三號令，將上開令文所稱退休人員限於依法任用並依公務人員退休法辦理退休之公務人員為其適用範圍。又於七十四年五月十八日以台七十四人政肆字第一四九二七號函稱：對於事務管理規則修正前配住宿舍，而於該規則修正後退休之人員准予續住至宿舍處理時為止等語，並未改變前述函令關於退休人員適用範圍之涵義。台灣省菸酒公賣局為公營事業機構，其職員之任用非依公務人員任用法，其退休亦非依公務人員退休法辦理，自非行政院台四十九人字第六七一九號令及台七十四人政肆字第一四九二七號函適用之對象。

their retirement is not governed by the Public Functionaries Retirement Act. Therefore such employees are not subjects to whom the Executive Yuan Order Tai-Zen-Ji (49) No.6719 of December 1, 1960, and Letter (74) Ren-Chung (4) No. 14927 of May 18, 1985, apply.

REASONING: The provision of public housing units for employees during their period of employment by administrative agencies, public schools or state-owned enterprises, in order to guarantee a standard living condition to their employees, is within their asset-management authority under the regulations of the organization. Although employees who have left their positions, due to retirement or transfer, should vacate the public housing units they have been occupying, they may be permitted to continue such occupation as an expedient measure by the government to look after the welfare of such employees. To perform its duties as the highest executive organ of the State and determine the distribution of the State's limited resources, the Executive Yuan may proclaim relevant rules as are necessary

解釋理由書：行政機關、公立學校或公營事業機構，為安定現職人員生活，提供宿舍予其所屬人員任職期間居住，本屬其依組織法規管理財物之權限內行為；至因退休、調職等原因離職之人員，原應隨即歸還其所使用之宿舍，惟為兼顧此等人員生活，非不得於必要時酌情准其暫時續住以為權宜措施。行政院基於全國最高行政機關之職責，盱衡國家有限資源之分配，依公教人員、公營事業機構服務人員任用法規、俸給結構之不同，自得發布相關規定為必要合理之規範，以供遵循。

and reasonable, taking into consideration the differences between the Government Employees and Teachers Appointment Act and the State-owned enterprise Employees Appointment Act and their remuneration structures.

The Executive Yuan announced a Guideline through its Order Tai-Zen-Ji (46) No.3058 of June 6, 1957, which applies to the management of administrative agencies, state-owned enterprises and public schools and permits the official employees under the system, who meet the criteria, to apply for the allotment of single or family public housing units. Employees who have been allotted such housing should vacate the housing upon retirement or transfer so they may be reoccupied. Order Tai-Zen-Ji (49) No.6719 of the same Yuan dated December 1, 1960, permitted retired officials to reside continuously in their public housing units until the Measures Governing Residential Placement of Retired Officials' was proclaimed. Order Tai-Zen-Ji (56) No. 8053 of October 12, 1967, restricted the phrase "retired officials" referred to in the afore-

行政院於四十六年六月六日以台四十六人字第三〇五八號令頒事務管理規則，適用於行政機關、公營事業機構及公立學校之事務管理，各機關編制內之正式人員，合於申配標準者，均得申請配給單身或眷屬宿舍。受配住宿舍人員嗣後因退休、調職等原因而離去原任職機關者，即應返還，俾公有宿舍得以循環使用。同院於四十九年十二月一日以台四十九人字第六七一九號令，准許已退休人員得暫時續住現住宿舍，俟退休人員居住房屋問題處理辦法公布後再行處理。繼於五十六年十月十二日以台五十六人字第八〇五三號令，將上開令文所稱退休人員限於依法任用並依公務人員退休法辦理退休之公務人員為其適用範圍（五十八年十二月八日台五十八人政肆字第二五七六八號令及六十一年七月十九日台六十一人政肆字第二〇七三三號令亦同），係對事務管理規則及上揭四十九年令所為之補充規定，均符

mentioned Order to public servants appointed pursuant to the law and to public servants who have applied for retirement in accordance with the Public Functionaries Retirement Act (Order (58) Ren-Chung (4) No.15768 of December 8, 1969, and Order (61) Ren-Chung (4) No.20733 of July 19, 1972 have the same effect). They are supplementary provisions to the Management Guidelines and the abovementioned Order of 1960 and are consistent with the objectives first mentioned above. As to Letter (74) Ren-Chung (4) No.14927 dated May 18, 1985, it stated that: "the statements regarding the allotment of public housing units prior to the amendment of the Management Guidelines, and regarding the permission granted to retired officials to continue their occupation of such housing after the amendment of the said Guidelines until the housing units are re-allotted do not alter the scope of application of the abovementioned Letter to retired officials."

合首開意旨。至行政院於七十四年五月十八日以台七十四人政肆字第一四九二七號函稱：對於事務管理規則修正前配住宿舍，而於該規則修正後退休之人員准予續住至宿舍處理時為止等語，並未改變前述函令關於退休人員適用範圍之涵義。

The Taiwan Tobacco and Monopoly Bureau is a state-owned enterprise. It in-

台灣省菸酒公賣局為公營事業機構，於六十三年一月一日起實施單一薪

troduced a uniform remuneration program starting from January 1, 1974, and a remuneration rate on January 1, 1980. The uniform remuneration program has taken into consideration all the factors relating to sustenance allowance and provision of public housing units to employees of state-owned enterprises, and is based on a different structure than the remuneration of public servants. Further, Article 33 of the Public Functionaries Appointment Act stipulated that the appointment of state-owned enterprise employees shall be governed by another law. Before the relevant law was introduced, Article 2 of the Public Functionaries Retirement Act and Article 2 of the Enforcement Rules of the said Act prohibited employees of state-owned enterprises from applying for retirement under the said Act (See Interpretation No.270). Employees of the Taiwan Tobacco and Monopoly Bureau are appointed pursuant to the "Taiwan Provincial State-owned enterprise Employees Temporary Appointment Rules," and may apply for retirement in accordance with the "Taiwan Provincial State-owned enterprise Employees Retirement Rules"

俸，六十九年一月一日起實施用人費率，因單一薪俸制已將公營事業機構人員各種生活補助、宿舍供應等因素考量在內，與一般公務人員俸給結構不同。又公營事業機構人員之任用，依公務人員任用法第三十三條規定，應另以法律定之，在此項法律制定前，依公務人員退休法第二條及該法施行細則第二條規定，公營事業機構人員無從依公務人員退休法辦理退休（本院釋字第二七〇號解釋參照）。台灣省菸酒公賣局之職員係依據「臺灣地區省（市）營事業機構人員遴用暫行辦法」任用，並依據「臺灣省政府所屬省營事業機關職員退休辦法」暨「臺灣省政府所屬省營事業機構人員退休撫卹及資遣辦法」辦理退休。是台灣省菸酒公賣局退休人員既非依公務人員任用法任用，亦非依公務人員退休法辦理退休，自非上開行政院台四十九人字第六七一九號令及台七十四人政肆字第一四九二七號函之適用對象。

and the "Taiwan Provincial Government Subordinate Enterprise Employees Retirement Remuneration and Reward Rules." Since the employees of the Taiwan Tobacco and Monopoly Bureau are not appointed in accordance with the Public Functionaries Appointment Act and their retirement is not governed by the Public Functionaries Retirement Act, they are not subjects to whom the Executive Yuan Order Tai-Zen-Ji (49) No.6719 of December 1, 1960, and Letter (74) Ren-Chung (4) No.14927 of May 18, 1985, apply.

J. Y. Interpretation No.558（April 18, 2003）*

ISSUE: May the nationals, who have chosen their domicile and have had a household registry in Taiwan Area, return to the homeland at any time without being granted permission?

RELEVANT LAWS:

Articles 10 and 23 of the Constitution（憲法第十條、第二十三條）; Article 11 of the Amendments to the Constitution（憲法增修條文第十一條）; J.Y. Interpretation Nos. 265, 454 and 497（司法院釋字第二六五號、第四五四號、第四九七號解釋）; Articles 3, Paragraph 1, and Paragraph 2, Subparagraph 2, and 6 of the National Security Act（國家安全法第三條第一項、第二項第二款、第六條）; Articles 3, Subparagraph 1, and 5, Paragraph 1, and 7 of the Immigration Act（入出國及移民法第三條第一款、第五條第一項、第七條）.

KEYWORDS:

freedom of residence and movement（居住、遷徙之自由）, domain of the country（國家疆域）, household registry（戶籍）, principle of proportionality（比例原則）.**

HOLDING: The rationale of Article 10 of the Constitution, which stipulates that the people shall have freedom of

解釋文：憲法第十條規定人民有居住、遷徙之自由，旨在保障人民有自由設定住居所、遷徙、旅行，包括入

* Translated by Wei-Feng Huang of THY Taiwan International Law Offices.

** Contents within frame, not part of the original text, are added for reference purpose only.

residence and movement, is to protect the people's freedom to choose and change their residence and to travel, including the right to exit or enter the country. The people are one of the elements that constitute the country so they should not be excluded from the domain of the country. If the nationals choose their domicile and have a household registry in Taiwan Area, they can return to the homeland at any time without asking for grant permission; however, the right of the people to exit or enter the country may be restricted in order to protect the safety of the country and the order of the society, only if the restriction is stipulated by law and pursuant to the principle of proportionality elaborated in Article 23 of the Constitution.

出國境之權利。人民為構成國家要素之一，從而國家不得將國民排斥於國家疆域之外。於臺灣地區設有住所而有戶籍之國民得隨時返回本國，無待許可，惟為維護國家安全及社會秩序，人民入出境之權利，並非不得限制，但須符合憲法第二十三條之比例原則，並以法律定之。

The National Security Act During the Period of National Mobilization for Suppression of the Communist Rebellion was promulgated when martial law was about to be abolished. Article 3, Paragraph 2, Subparagraph 2, of said Act, was stipulated to meet the country's then existing requirements applicable to the period for the suppression of the communist rebel-

動員戡亂時期國家安全法制定於解除戒嚴之際，其第三條第二項第二款係為因應當時國家情勢所為之規定，適用於動員戡亂時期，雖與憲法尚無牴觸（參照本院釋字第二六五號解釋），惟中華民國八十一年修正後之國家安全法第三條第一項仍泛指人民入出境均應經主管機關之許可，未區分國民是否於臺灣地區設有住所而有戶籍，一律非經許

lion and is therefore not in conflict with the Constitution. (See also J.Y. Interpretation No. 265). However, Article 3, Paragraph 1, of the National Security Act, as amended in 1992, making no distinction between those people who chose their domicile and thus have a household registry in Taiwan area and those who have not, uniformly requires that people apply with the governing authority to be granted permission to enter the country and prohibits those people who are not granted permission from entering the country, and such provision also imposes a punishment clause on those people who enter the country without being granted permission. (See Article 6 of said Act) As such, the provision is in violation of the principle of proportionality elaborated in Article of 23 of the Constitution and the freedom of people to return to the homeland at any time. Consequently, such provisions, for those parts that cannot be reconciled with the objectives of this Interpretation, shall be held invalid when the Act for exiting or entering the country promulgated by the legislative body is operative.

可不得入境，並對未經許可入境者，予以刑罰制裁（參照該法第六條），違反憲法第二十三條規定之比例原則，侵害國民得隨時返回本國之自由。國家安全法上揭規定，與首開解釋意旨不符部分，應自立法機關基於裁量權限，專就入出境所制定之法律相關規定施行時起，不予適用。

REASONING: The Taiwan High Court brought this case before this Yuan for an interpretation after the court examined a case and had doubt about the constitutionality of Article 3, Paragraph 1, of the National Security Act. The law provides that: "People exiting or entering the country shall apply to the Ministry of the Interior Entry and Exit Service Bureau to be granted permission and those who are not granted permission are prohibited from exiting or entering the country". It should be addressed hereby that according to said Act, a person in violation of Article 6, Paragraph 1, would be subject to imprisonment of not more than three years or criminal detention and/or a fine of not more than ninety thousand NT dollars. Given that such punishment has significant bearing on the court's rendering a judgment, it can be the objective in the application for an interpretation.

解釋理由書：本件係臺灣高等法院於審理案件時，認所適用之國家安全法第三條第一項規定：「人民入出境，應向內政部警政署入出境管理局申請許可。未經許可者，不得入出境。」有違憲疑義，向本院聲請解釋。因違反上開規定者，依同法第六條第一項規定處三年以下有期徒刑、拘役或科或併科新臺幣九萬元以下罰金，此項處罰條款對於受理法院在審判上有重要關連性，而得為釋憲之客體，合先說明。

The rationale of Article 10 of the Constitution, which stipulates that the people shall have freedom of residence and movement, is to protect the people's freedom to choose and change their resi-

憲法第十條規定人民有居住、遷徙之自由，旨在保障人民有自由設定住居所、遷徙、旅行，包括入出國境之權利。人民為構成國家要素之一，從而國家不得將國民排斥於國家疆域之外。於

dence and to travel, including the right to exit or enter the country. The people are one of the elements that constitute the country so they should not be excluded from the domain of the country. If the nationals choose their domicile and have a household registry in Taiwan Area, they can return to the homeland at any time without asking to be granted permission; however, the right of the people to exit or enter the country may be restricted in order to protect the safety of the country and the order of the society, only if the restriction is stipulated by law, pursuant to the principle of proportionality elaborated in Article of 23 of the Constitution, and only under such circumstances can it be in compliance with the Constitution's objective to protect the people's rights. Interpretation No. 454 of this Yuan is made in accordance with the same objective as hereby stated. Article 11 of the Amendments to the Constitution stipulates that "rights and obligations between the people living in a free area and those of the Chinese mainland area, and the disposition of other related affairs may be specially prescribed by law", as such, the re-

臺灣地區設有住所而有戶籍之國民得隨時返回本國，無待許可，惟為維護國家安全及社會秩序，人民入出境之權利，並非不得限制，但須符合憲法第二十三條之比例原則，並以法律定之，方符憲法保障人民權利之意旨，本院釋字第四五四號解釋即係本此旨趣。依現行憲法增修條文第十一條規定，自由地區與大陸地區間人民權利義務關係及其他事務之處理，得以法律為特別之規定，是法律就大陸地區人民進入臺灣地區設有限制，符合憲法上開意旨（參照本院釋字第四九七號解釋）。其僑居國外具有中華民國國籍之國民若非於臺灣地區設有住所而有戶籍，仍應適用相關法律之規定（參照入出國及移民法第三條第一款、第五條第一項、第七條規定），此為我國國情之特殊性所使然。至前開所稱設有戶籍者，非不得推定具有久住之意思。

striction imposed on the people from the Chinese mainland area to enter Taiwan area is consistent with the rationale of the Constitution. (See J.Y. Interpretation No. 497) For those who are citizens of the Republic of China, residing outside of the country and who have no domicile but have a household registry in Taiwan Area, the relevant provisions of the Immigration Act should also be applicable due to the nature of our nation's unique circumstances. (See Article 3, Subparagraph 1, Article 5, Paragraph 1 and Article 7 of the Immigration Act) The people mentioned above who have a household registry in Taiwan may be presumed to have the intention to reside in Taiwan permanently.

The National Security Act During the Period of National Mobilization for Suppression of the Communist Rebellion was promulgated in 1987 when martial law was about to be abolished. Article 3, Paragraph 2, Subparagraph 2, of said Act, was stipulated to meet the country's then existing requirements applicable to the period for the suppression of the communist rebellion and is therefore not in conflict

七十六年公布之動員戡亂時期國家安全法制定於解除戒嚴之際，其第三條第二項第二款係為因應當時國家情勢所為之規定，適用於動員戡亂時期，與憲法尚無牴觸，業經本院釋字第二六五號解釋在案。但終止動員戡亂時期及解除戒嚴之後，國家法制自應逐步回歸正常狀態。立法機關旰衡解嚴及終止動員戡亂時期後之情勢，已制定入出國及移民法，並於八十八年五月二十一日公布

with the Constitution. This Yuan's Interpretation No. 536 has also explained the foregoing; however, after the abolishment of the National Security Act During the Period of National Mobilization for Suppression of the Communist Rebellion and martial law, the legal system of this country shall return to the normal course of operations. The Legislative Yuan, considering the above situation, has enacted the Immigration Act and it became effective on May 21, 1999. Furthermore, the legislature has in its sole discretion set out the effective date in relevant provisions of the law with respect to matters concerning exiting and entering the country. Article 3, Paragraph 1, of the National Security Act amended in 1992, making no distinction between those people who chose their domicile and thus have a household registry in Taiwan Area and those who have not, uniformly requires that people apply with the governing authority to be granted permission to enter the country and prohibits those people who are not granted permission from entering the country, and such provision also imposed a punishment clause on those people who enter the

施行，復基於其裁量權限，專就入出境所制定之相關法律規定施行日期。國家安全法於八十一年修正，其第三條第一項仍泛指人民入出境均應經主管機關許可，未區分國民是否於臺灣地區設有住所而有戶籍，一律非經許可不得入境，對於未經許可入境者，並依同法第六條第一項規定處三年以下有期徒刑、拘役或科或併科新臺幣九萬元以下罰金，違反憲法第二十三條規定之比例原則，侵害國民得隨時返回本國之自由，國家安全法上揭規定，與首開解釋意旨不符，應自入出國及移民法之相關規定施行時起，不予適用。

country without being granted permission. As such, the provision is in violation of the principle of proportionality elaborated in Article of 23 of the Constitution and the freedom of people to return to the homeland at any time. Consequently, such provision, for those parts that cannot be reconciled with the objectives of this Interpretation, shall be held invalid when the Act for exiting or entering the country promulgated by the legislative body is operative.

Justice Tieh-Cheng Liu filed dissenting opinion.

Justice Hsiang-Fei Tung filed dissenting opinion.

本號解釋劉大法官鐵錚、董大法官翔飛分別提出不同意見書。

J. Y. Interpretation No.559（May 2, 2003）*

ISSUE: Where the compulsory execution of a protection order under the Domestic Violence Prevention Act involves restraint on the personal liberty and property right of the people, is it constitutional for the said Act to make general authorization on the agency to be charged with the execution and the procedure to be followed?

RELEVANT LAWS:

Articles 13, 15, 20, Paragraph 1, and 52 of the Domestic Violence Prevention Act（家庭暴力防治法第十三條、第十五條、第二十條第一項、第五十二條）; Article 4 of the Administrative Execution Act（行政執行法第四條）; Article 306, Paragraphs 1 and 2 of the Administrative Proceedings Act（行政訴訟法第三百零六條第一項、第二項）; Article 19, Paragraphs 1 and 2 of the Regulation Governing the Enforcement of Protection Orders and Handling of Domestic Violence Cases by Police Authorities（警察機關執行保護令及處理家庭暴力案件辦法第十九條第一項、第二項）.

KEYWORDS:

personal liberty（人身自由）, protection order（保護令）, monetary payment（金錢給付）, general authorization（概括授權）, domestic violence（家庭暴力案件）, minor child

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* Translated by Raymond T. Chu.

** Contents within frame, not part of the original text, are added for reference purpose only.

（未成年子女），victim（被害人），opposite party（相對人），enforcement title（執行名義），Administrative Enforcement Agency, Ministry of Justice（法務部行政執行署）.**

HOLDING: It is a fundamental principle in all rule-of-law countries that all matters involving restraint on the physical freedom must be prescribed by law, whereas matters involving restrictions on property right may be prescribed either by statutes or by regulations explicitly authorized by law, depending on the degree of restriction. Where the law has express provisions dealing with personal bodies, it is not prohibited that competent authorities be specifically and explicitly authorized by law to put such provisions into effect. Nor does the law prohibit the issue of ordinances by competent authorities under the general authorization of law if such ordinances are designed to regulate only such incidental matters as concerning details and technicalities. The Domestic Violence Prevention Act specifies in Article 20, Paragraph 1, the agency empow-

解釋文：基於法治國家之基本原則，凡涉及人身自由之限制事項，應以法律定之；涉及財產權者，則得依其限制之程度，以法律或法律明確授權之命令予以規範。惟法律本身若已就人身之處置為明文之規定者，應非不得以法律具體明確之授權委由主管機關執行之。至主管機關依法律概括授權所發布之命令若僅屬細節性、技術性之次要事項者，並非法所不許。家庭暴力防治法第二十條第一項規定保護令之執行機關及金錢給付保護令之強制執行程序，對警察機關執行非金錢給付保護令之程序及方法則未加規定，僅以同法第五十二條為概括授權：「警察機關執行保護令及處理家庭暴力案件辦法，由中央主管機關定之。」雖不生牴觸憲法問題，然對警察機關執行上開保護令得適用之程序及方法均未加規定，且未對辦法內容為具體明確之授權，保護令既有涉及人身之處置或財產之強制執行者（參照家

ered to execute protection orders and the procedures for the compulsory execution of protection orders for monetary payment, but is silent in respect of the procedures and methods to be followed by police authorities in enforcing protection orders requiring no monetary payment. It only provides by way of general authorization under Article 52 that "the rules governing the enforcement of protection orders and handling of domestic violence cases by police authorities shall be established by the central competent authority." While this is not contrary to the Constitution, it lacks provisions for the procedures and methods to be followed by police authorities in enforcing such protection orders as well as specific and explicit authorization with respect to the contents of such rules. Inasmuch as protection orders may involve either actions to be taken against personal bodies or compulsory execution against property (See the Domestic Violence Prevention Act, Articles 13 and 15), such actions and the process of execution, in consideration of the opinion given above, must be respectively prescribed by law or by ordinances to be is-

庭暴力防治法第十三條及第十五條），揆諸前開解釋意旨，應分別情形以法律或法律具體明確授權之命令定之，有關機關應從速修訂相關法律，以符憲法保障人民權利之本旨。

sued under specific and explicit authorization of law, and the competent authorities shall accordingly cause amendments to be made to relevant statutes to bring them into accord with the intent of the Constitution in protecting the right of the people.

The government authorities in charge of administrative execution under the Administrative Execution Act include, in cases of monetary payment, regional offices under the Administrative Enforcement Agency, Ministry of Justice, and for other matters, the authority making the original administrative act or an agency in charge of such matters (See the Administrative Execution Act, Article 4). Under the Domestic Violence Prevention Act, the police authorities are charged with the duty to enforce protection orders other than those requiring monetary payment. Thus, before the relevant statutes are amended as ordered above, the police authorities, in the course of enforcing protection orders in specific cases, may apply mutatis mutandis the procedures set forth in the Administrative Execution Act and take appropriation actions for the purpose

行政執行法之執行機關除金錢給付之執行為法務部行政執行署所屬行政執行處外，其餘事件依其性質分由原處分機關或該管機關為之（參照行政執行法第四條），依上述家庭暴力防治法規定，警察機關有執行金錢給付以外保護令之職責，其於執行具體事件應適用之程序，在法律未依上開解釋修改前，警察機關執行保護令得準用行政執行法規定之程序而採各種適當之執行方法。

of enforcing such orders.

REASONING: It is a fundamental principle in all rule-of-law countries that all matters involving restraint on the physical freedom must be prescribed by law, whereas matters involving restrictions on property right may be prescribed either by statutes or by regulations explicitly authorized by law, depending on the degree of restriction. Where the law has express provisions dealing with personal bodies, it is not prohibited that competent authorities be specifically and explicitly authorized by law to put such provisions into effect. Nor does the law prohibit the issue of ordinances by competent authorities under the general authorization of law if such ordinances are designed to regulate only such incidental matters as concerning details and technicality. This was held by this Yuan in previous cases. Based on this reason, Article 52 of the Domestic Violence Prevention Act providing that "the rules governing the enforcement of protection orders and handling of domestic violence cases by police authorities shall be established by the central competent

解釋理由書：基於法治國家之基本原則，凡涉及人身自由之限制事項，應以法律定之；涉及財產權者，則得依其限制之程度，以法律或法律明確授權之命令予以規範。惟法律本身若已就人身之處置為明文之規定者，應非不得以法律具體明確之授權委由主管機關執行之。至主管機關依法律概括授權所發布之命令若僅屬細節性、技術性之次要事項者，並非法所不許，經本院解釋有案。從而家庭暴力防治法第五十二條規定：「警察機關執行保護令及處理家庭暴力案件辦法，由中央主管機關定之。」尚不生牴觸憲法問題。主管機關內政部依家庭暴力防治法上開授權，於中華民國八十八年六月二十二日發布之警察機關執行保護令及處理家庭暴力案件辦法，其內容與立法機關授權之本意並無違背，該辦法第十九條第一、二項規定：「警察機關依保護令執行交付未成年子女時，得審酌被害人與相對人之意見，決定交付之時間、地點及方式。」「前項執行遇有困難無法完成交付者，應記錄執行情形，並報告保護令原核發法院。」係對執行法院所核發保護令之細節性事項，亦無違法可言。

authority" gives rise to no question of unconstitutionality. And the Regulation Governing the Enforcement of Protection Orders and Handling of Domestic Violence Cases by Police Authorities promulgated by the Ministry of Interior, as the competent authority, on June 22, 1999, are not in conflict with the intent of the legislature in authorizing the making of such rules. Paragraphs 1 and 2 of Article 19 of the Regulation provide respectively: "When enforcing the turnover of a minor child, the police authorities may determine the time, place and manner of turnover by taking into consideration the opinions of the victim and the opposite party," and "If the police authorities encounter any difficulty, making it impossible to complete the process of turnover referred to in the preceding paragraph, the facts of such execution shall be recorded and reported to the court issuing the original protection order." These Paragraphs set out details in respect of protection orders issued by the court, and cannot be said to be against the law.

The so-called "civil protection order" 家庭暴力防治法所稱之民事保護

in the Domestic Violence Prevention Act refers to the order issued by the court either upon petition or ex officio, to a person who engages in domestic violence, for the purpose of preventing the occurrence of domestic violence by granting protection to the victim or the minor children thereof or any other specific member of the family. Article 20, Paragraph 1, of the Act provides that "the execution of protection orders shall be the duty of police authorities; provided, however, that a protection order for monetary payment may serve as an enforcement title by which a motion for compulsory execution may be filed with the court." The provision merely specifies the agency charged with the enforcement of protection orders and the process of enforcing protection orders for monetary payment. While Article 52 of the Act authorizes the making of rules on the execution of cases involving no monetary payment, it does not provide for the procedures and methods to be followed by police authorities in enforcing such protection orders; nor does it grant specific and explicit authorization with respect to the contents of such rules. In-

令係法院為防治家庭暴力，基於保護被害人及其未成年子女或其他特定家庭成員，而依聲請或依職權對實施家庭暴力者所核發。同法第二十條第一項：「保護令之執行，由警察機關為之。但關於金錢給付之保護令，得為執行名義，向法院聲請強制執行。」僅規定保護令之執行機關、金錢給付保護令之執行程序。同法第五十二條雖授權訂定非關金錢給付事件之執行辦法，但對警察機關執行上開保護令得適用之程序及方法均未加規定，且未對辦法內容為具體明確之授權，保護令既有涉及人身之處置或財產之強制執行者（參照家庭暴力防治法第十三條及第十五條），揆諸前開解釋意旨，應分別情形以法律或法律具體明確授權之命令定之，有關機關應從速修訂相關法律，例如在家庭暴力防治法中，就非金錢給付之保護令明定其執行機關及執行程序所依據者為行政執行法或強制執行法；若授權訂定執行辦法者，應就作為及不作為義務之執行等，如何準用上開法律，作細節性規定，以符憲法保障人民權利之本旨。

asmuch as protection orders may involve either actions to be taken against personal bodies or compulsory execution against property (See the Domestic Violence Prevention Act, Articles 13 and 15), such actions and the process of execution, in consideration of the opinion given above, must be respectively prescribed by law or by ordinances to be issued under specific and explicit authorization of law, and the competent authority of the government shall accordingly cause amendments to be made to relevant statutes to bring them into accord with the intent of the Constitution in protecting the right of the people. To give some examples, it may be desirable to specify clearly in the Domestic Violence Prevention Act the agency responsible for the enforcement of protection orders other than those requiring monetary payment and that the procedures to be followed in enforcing such orders must be based on the Administrative Execution Act or the Compulsory Enforcement Act; if authorization will be granted for the making of rules of execution, detailed provisions should be incorporated in the Act with respect to the mutatis mu-

tandis application of such statutes in the execution of, inter alia, the duty to act and not to act.

The government authorities in charge of administrative execution under the Administrative Execution Act include, in cases of monetary payment, regional offices under the Administrative Enforcement Agency, Ministry of Justice, and for other matters, the authority making the original administrative act or an agency in charge of such matters (See the Administrative Execution Act, Article 4). In case of judgments delivered by courts of all levels, they are enforced in principle by the competent district court pursuant to the Compulsory Enforcement Act. The judgments may also be enforced by the administrative authorities pursuant to the Administrative Execution Act on mandate if it is so specifically provided by law (See the Administrative Proceedings Act, Article 306, Paragraphs 1 and 2). In such a case, the administrative agency with the power of execution is also a competent authority within the meaning of Article 4 of the Administrative Execution Act. Un-

行政執行法之執行機關除金錢給付之執行為法務部行政執行署所屬行政執行處外，其餘事件依其性質分由原處分機關或該管機關為之（參照行政執行法第四條）。按各級法院裁判之執行，以由該管地方法院依強制執行法為之為原則，如法律有特別規定亦得委由行政機關依行政執行法執行（參照行政訴訟法第三百零六條第一項及第二項）。遇此情形，有執行權限之行政機關，亦屬上開行政執行法第四條所稱之該管機關。依上述家庭暴力防治法規定，警察機關有執行金錢給付以外保護令之職責，其於執行具體事件應適用之程序，在法律未依上開解釋修改前，警察機關執行保護令得準用行政執行法規定之程序而採各種適當之執行方法。

der the Domestic Violence Prevention Act, the police authorities are charged with the duty to enforce protection orders other than those requiring monetary payment. Thus, before the relevant statutes are amended as ordered above, the police authorities, in the course of enforcing protection orders in specific cases, may apply mutatis mutandis the procedures set forth in the Administrative Execution Act and take appropriate actions for the purpose of enforcing such orders.

J. Y. Interpretation No.560（July 4, 2003）*

ISSUE: Is an alien employee entitled to claim burial compensation under Article 62 of the Labor Insurance Act for the death of his dependent who did not live with the employee inside the territory of jurisdiction of the Act and died outside such territory?

RELEVANT LAWS:

Articles 7, 15 and 23 of the Constitution（憲法第七條、第十五條、第二十三條）; Articles 15, 62 and Chapter 5 of the Labor Insurance Act（勞工保險條例第十五條、第六十二條、第五章）; Article 43, Paragraph 5 of the Employment Services Act（就業服務法第四十三條第五項）.

KEYWORDS:

employment insurance（勞工保險）, social welfare program（社會福利制度）, social insurance（社會保險）, social security（社會安全）, insurance fund（保險基金）, insurance premium（保險費）, the insured（被保險人）, burial compensation（喪葬津貼）, insured unit（投保單位）, insured peril（保險事故）, jurisdictional territory（實施區域）, alien employee（受聘僱之外國人）.**

HOLDING: Labor insurance is a social welfare program established by the

解釋文：勞工保險乃立法機關本於憲法保護勞工、實施社會保險之基

* Translated by Raymond T. Chu.

** Contents within frame, not part of the original text, are added for reference purpose only.

Legislature under the nation's fundamental policy as manifested by the Constitution for protecting workers and implementing the social insurance program, with the purpose of guaranteeing workers a stable livelihood and promoting the social security. The insurance fund established as a part of the labor insurance program is composed of an insurance premium paid by the insured persons and the portion shared by employers in addition to the pro rata subsidies from governments at all levels. Under the Labor Insurance Act, payment is made mainly for medical care, disability, retirement, death, and other events occurring to the insured. The provision of Article 62 of the Act whereby an insured may claim the benefit of burial compensation for the death of his parent, spouse, or child is designed to alleviate the increased financial burden on the insured as a result of the loss of a member of his family, and the payment thereunder is certainly distinguishable from the regular compensation payable against an insured peril that occurred to the insured himself in that it carries concurrently the nature of social aid and as such must be

本國策所建立之社會福利制度，旨在保障勞工生活安定、促進社會安全。勞工保險制度設置之保險基金，除由被保險人繳納之保險費、雇主分擔額所構成外，另有各級政府按一定比例之補助在內。依勞工保險條例規定，其給付主要係基於被保險人本身發生之事由而提供之醫療、傷殘、退休及死亡等之給付。同條例第六十二條就被保險人之父母、配偶、子女死亡可請領喪葬津貼之規定，乃為減輕被保險人因至親遭逢變故所增加財務負擔而設，自有別於一般以被保險人本人發生保險事故之給付，兼具社會扶助之性質，應視發生保險事故者是否屬社會安全制度所欲保障之範圍決定之。中華民國八十一年五月八日制定公布之就業服務法第四十三條第五項，就外國人眷屬在勞工保險條例實施區域以外發生死亡事故者，限制其不得請領喪葬津貼，係為社會安全之考量所為之特別規定，屬立法裁量範圍，與憲法第七條、第十五條規定意旨尚無違背。

determined depending upon whether the person to whom the insured peril occurs is covered under the protection provided by the social security program. The Employment Services Act promulgated on May 8, 1992, provides in Article 43, Paragraph 5, that in the case of death of a dependant of an alien employee occurring outside the jurisdictional territory of the Labor Insurance Act, no entitlement to burial compensation may be claimed. This is a special provision enacted for the purpose of social security within the scope of legislative discretion and is not contrary to the essence embodied in Articles 7 and 15 of the Constitution.

REASONING: Labor insurance is a social welfare program established by the state under the nation's fundamental policy as manifested by the Constitution for protecting workers and implementing the social insurance program, with the purpose of guaranteeing workers a stable livelihood and promoting the social security. Under the Labor Insurance Act, the insurance fund established as a part of the labor insurance program is composed of

解釋理由書：勞工保險係國家為實現憲法保護勞工、實施社會保險等基本國策所建立之社會福利制度，旨在保障勞工生活安定，促進社會安全。該勞工保險制度設置之保險基金，依勞工保險條例規定，除由被保險人繳納之保險費、投保單位之分擔額所構成外，另有各級政府按一定比例之補助在內，保險制度之運作亦由國家以財政支持（勞工保險條例第十五條及第五章參照）。依同條例規定，其給付主要係基於被保

the insurance premium paid by the insured persons and the portion shared by the insured units in addition to the pro rata subsidies from governments at all levels. The operation of such insurance program is also financed by the state (See Labor Insurance Act, Article 15 and Chapter 5). Under said Act, payment is made mainly for medical treatment, disability, retirement, death, and other events occurring to the insured. The purpose of Article 62 of the Act, whereby an insured is entitled to payment in a sum equal to one and one half to three months of his average wage for which he is insured in the case of the death of his parent, spouse, or child, is to alleviate the burden on the worker's family finances and to help him maintain financial stability by way of making available to him burial compensation to meet his increased expenses incurred as a result of the loss of a member of his family. To the extent that such payment is made available in the case where an insured peril occurred to a person other than the insured, it is certainly distinguishable from the compensation payable against an insured peril that occurred to the insured

險人本身發生之事由而提供之醫療、傷殘、退休及死亡等之給付。勞工保險條例第六十二條規定，被保險人之父母、配偶或子女死亡時，可請領一個半月至三個月之平均月投保薪資，考其意旨，乃就被保險人因至親遭逢變故致增加財務支出所為之喪葬津貼，藉以減輕勞工家庭負擔，維護其生活安定。該項給付既以被保險人以外之人發生保險事故作為給付之項目，自有別於以被保險人發生保險事故者，而係兼具社會扶助之性質，立法機關得視發生保險事故者是否屬社會安全制度所保障，而本於前揭意旨形成此項給付之必要照顧範圍。

in that it carries concurrently the nature of social aid, and the Legislature is empowered to define the necessary coverage of such payment consistent with the essence expressed above by taking into account whether the person to whom the insured peril occurs is covered under the protection to be accorded by the social security program.

The Employment Services Act promulgated on May 8, 1992, is enacted for the purpose of promoting the employment of nationals and furthering the social and economic development. The Act provides in Article 43, Paragraph 5 (re-numbered Article 46 in the Employment Services Act amended on January 21, 2002, in which the clause herein cited was deleted) that in the case of the death of a dependant of an alien employee occurring outside the territory where the Labor Insurance Act is implemented, no entitlement to burial compensation shall be available. It means that no burial compensation may be claimed by an alien employee for the death of his dependent if such dependent did not live with the alien

八十一年五月八日公布之就業服務法，係為促進國民就業，增進社會及經濟發展而制定。同法第四十三條第五項規定（九十一年一月二十一日修正公布之就業服務法已改列第四十六條，並刪除此項規定）受聘僱外國人其眷屬在勞工保險條例實施區域外死亡者，不得請領保險給付，係指該眷屬未與受聘僱之外國人在條例實施區域內共同生活，而在區域外死亡者，不得請領眷屬死亡喪葬津貼而言。就業服務法上開限制之規定，乃本於社會安全制度功能之考量，並因該喪葬津貼給付之性質，與通常勞工保險之給付有別，已如前述。就社會扶助之條件言，眷屬身居國外未與受聘僱外國人在條例實施區域內共同生活者，與我國勞工眷屬及身居條例實施區域內之受聘僱外國人眷屬，其生活上

employee inside the jurisdictional territory of the Act and died outside such territory. As already stated above, the restriction set forth in the Employment Services Act is based on the consideration of the function of the social security system and the fact that such burial compensation is different in nature from the regular labor insurance coverage. From the viewpoint of eligibility for social aid, a dependent who lives in a foreign country instead of with the alien employee inside the territory of jurisdiction of the Act is distinguishable from the dependent of a local worker and the dependent of an alien employee living with him inside the territory of jurisdiction of the Act in the degree of reliance on living expenses. Thus, because of the particular nature of such benefit and considering the social appropriateness as a significant factor of the social security program and the degree of protection provided by foreign governments to workers from the Republic of China, it is essential that the Legislature makes reasonable adjustment of the coverage of such benefits to save expenditure from the insurance fund and the legislation gives rise to no problem of dis-

之經濟依賴程度不同，則基於該項給付之特殊性質，並按社會安全制度強調社會適當性，旰衡外國對我國勞工之保障程度，立法機關為撙節保險基金之支出，適當調整給付範圍乃屬必要，不生歧視問題。是就業服務法第四十三條第五項規定符合憲法第二十三條規定之意旨，與憲法第七條平等權、第十五條財產權之保障尚無違背。

crimination. We conclude that the provision of the Employment Services Act, Article 43, Paragraph 5, is consistent with the intent of Article 23 of the Constitution and is not in contradiction to the right of equality set forth in Article 7 of the Constitution and the right of property set forth in Article 15 of the Constitution.

J. Y. Interpretation No.561（July 4, 2003）*

ISSUE: Does the requirement of notice of collection of rent in default for registration of termination of lease contradict the Constitution?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）; J. Y. Interpretation Nos. 367, 443 and 547（司法院釋字第三六七號、第四四三號、第五四七號解釋）; Article 440, Paragraph 1 of the Civil Code（民法第四百四十條第一項）; Articles 1, 6 Paragraph 2, and 17 of the Act Governing Reduction of Farm Rent to 37.5 Percent（耕地三七五減租條例第一條、第六條第二項、第十七條）; Article 6, Paragraph 2, Subparagraph 3 of the Taiwan Provincial Regulation for the Registration of Lease of Farm Land（台灣省耕地租約登記辦法第六條第二項第三款）; Supreme Court precedent judgment Ref. No.(45)-Tai-Shang-205（最高法院四十五年台上字第二〇五號判例）.

KEYWORDS:

Reduction of Farm Rent to 37.5 Percent（耕地三七五減租）, lessor（出租人）, lessee（承租人）.**

HOLDING: The Taiwan Provincial Regulation for the Registration of

解釋文：台灣省耕地租約登記辦法係基於耕地三七五減租條例第六條

* Translated by Dr. C.Y. Huang of Tsar & Tsai Law Firm.

** Contents within frame, not part of the original text, are added for reference purpose only.

Lease of Farm Land is formulated pursuant to Paragraph 2 of Article 6 of the Act Governing Reduction of Farm Rent to 37.5 Percent. Article 6, Paragraph 2, Subparagraph 3, of said Regulation provides that a lessor who, per Article 17, Paragraph 1, Subparagraph 3, of said Act, applies to register the termination of lease, shall complete an application form and submit the lease, notice of rent in default, notice of termination of lease due to rent in default, and verification of delivery, or evidence of settlement through mediation or conciliation by the commission for lease of farm lands, or a final court judgment. The foregoing is a supplemental provision issued by the regulatory authority pursuant to authorizations granted by the law regarding details and minor technical issues concerning documents that the applicant should prepare, and is not prohibited under the Constitution. Article 1 of said Act provides: "Lease of farm land shall conform to this Act. Matters not provided for in this Act shall be governed by the Land Act and other laws". The provision of Paragraph 1 of Article 440 of the Civil Code, which provides that in

第二項授權而訂定，該辦法第六條第二項第三款規定，出租人依上開條例第十七條第一項第三款申請租約終止登記者，除應填具申請書外，並應檢具租約、欠租催告書、逾期不繳地租終止租約通知書及送達證明文件，或耕地租佃委員會調解、調處成立證明文件，或法院確定判決書。此係主管機關基於法律授權發布命令就申請人應檢具證明文件等細節性、技術性次要事項為必要補充規定，尚非憲法所不許。耕地三七五減租條例第一條規定：「耕地之租佃，依本條例之規定；本條例未規定者，依土地法及其他法律之規定。」民法第四百四十條第一項關於承租人租金支付有遲延者，出租人得定相當期限，催告承租人支付租金之規定，於出租人依本條例第十七條第一項第三款終止契約時，亦適用之。是前開耕地租約登記辦法第六條第二項第三款關於應檢具欠租催告書等規定，並未逾越法律授權，亦未增加法律所無之限制，與憲法尚無牴觸。

case of default in respect of payment of rent, the lessor may fix a reasonable period and notify the lessee to make payment, should also apply in the case where the lessor terminates the lease per Article 17, Paragraph 1, Subparagraph 3, of said Act. The above provision, requiring the notice of collection of rent in default and so forth, Article 6, Paragraph 2, Subparagraph 3, of said Act, neither exceeds the scope of authorization of the law nor imposes additional restriction that does not exist under the law, and does not contradict the Constitution.

REASONING: The petitioner in this case petitioned for interpretation of Article 6 of the Act Governing Reduction of Farm Rent to 37.5 Percent as amended in 1983 which provides that: "After this Act takes effect, the lease of farm land shall be made in writing. The lessor together with the lessee shall apply to register the execution, amendment, termination or renewal of the lease." "The Regulation for Registration referred to in the preceding Paragraph shall be prescribed by the provincial (city) government to be submit-

解釋理由書：本件聲請人據以聲請解釋之中華民國七十二年修正耕地三七五減租條例第六條規定：「本條例施行後，耕地租約應一律以書面為之；租約之訂立、變更、終止或換訂，應由出租人會同承租人申請登記。」「前項登記辦法，由省（市）政府擬定，報請行政院核定之。」當時之台灣省耕地租約登記辦法係依據此項授權而訂定。該辦法第六條第二項第三款規定，出租人依上開條例第十七條第一項第三款申請租約終止登記者，除應填具申請書外，並應檢具租約、欠租催告書、逾期不繳

ted to the Executive Yuan for approval." The Taiwan Provincial Regulation for the Registration of Lease of Farm Land effective at the time was prescribed pursuant to the aforesaid authorization. Article 6, Paragraph 3, Subparagraph 3, of said Regulation provides that a lessor who, per Article 17, Paragraph1, Subparagraph 3, of said Act, applies to register the termination of lease, shall complete an application form and submit the lease, notice of rent in default, notice of termination of lease due to rent in default, and verification of delivery, or evidence of settlement through mediation or conciliation by the commission for lease of farm lands, or a final court judgment. The foregoing is a supplemental provision issued by the regulatory authority pursuant to authorizations granted by the law regarding details and minor technical issues concerning documents that the applicant should prepare, and is not prohibited under the Constitution. (See Judicial Yuan Interpretations Nos. 367, 443 and 547).

地租終止租約通知書及送達證明文件，或耕地租佃委員會調解、調處成立證明文件，或法院確定判決書。此乃主管機關基於法律授權發布命令就申請人應檢具證明文件等細節性、技術性次要事項為必要補充規定，尚非憲法所不許（本院釋字第三六七號、第四四三號及第五四七號解釋等參照）。

Article 1 of the Act Governing Reduction of Farm Rent to 37.5 Percent pro-

耕地三七五減租條例第一條：「耕地之租佃，依本條例之規定；本條

vides: “Lease of farm land shall conform to this Act. Matters not provided for in this Act shall be governed by the Land Act and other laws”. The “other laws” in the foregoing include the provisions of the Civil Code regarding Lease. Paragraph 1 of Article 440 of the Civil Code provides that in case of default in respect of payment of rent, the lessor may fix a reasonable period and notify the lessee to make payment, and if the lessee does not pay within such period, the lessor may terminate the lease. That is, the lessor will not have the right to terminate the lease until the lessor fixes a reasonable period and notifies the lessee to make payment. The legislative purpose of the foregoing is to protect the lessee, and the aforesaid provision should also apply in the case where the lessor terminates the lease per Article 17, Paragraph 1, Subparagraph 3, of the Act Governing Reduction of Farm Rent to 37.5 Percent. The Supreme Court, in accordance with the aforesaid legislative purpose, has rendered the precedent judgment Ref. No. (45)-Tai-Shang-205. Accordingly, Article 6, Paragraph 2, Subparagraph 3, of said Regulation conforms

例未規定者，依土地法及其他法律之規定。」所稱「其他法律」包括民法租賃之規定在內。民法第四百四十條第一項：「承租人租金支付有遲延者，出租人得定相當期限，催告承租人支付租金，如承租人於其期限內不為支付，出租人得終止契約」，即出租人須對承租人定期催告支付遲延之租金，始有終止租約之權利，其立法目的旨在保護承租人，於出租人依耕地三七五減租條例第十七條第一項第三款終止契約時，亦應適用之，最高法院本此意旨，著有四十五年台上字第二〇五號判例。是前開耕地租約登記辦法第六條第二項第三款，符合本條例第一條、第十七條、民法第四百四十條等規定意旨，並未增加法律所無之限制，與憲法尚無牴觸。

to the purpose of Articles 1 and 17 of said Act and Article 440 of the Civil Code, does not prescribe additional restriction that does exist under the law, and does not contradict the Constitution.

The Petitioner questioned whether the Supreme Administrative Court Judgment Ref. No. (89)-Judgment-2754 applying Articles 2, 4 and 5 of the aforesaid Regulation contradicted the Constitution. Investigation indicates that the foregoing disputed whether the court made the right decision and applied the appropriate laws, but did not make any specific allegation on where and how, if at all, the ordinances applied in the final court judgment contradicted the Constitution. This contravenes Article 5, Paragraph 1, Subparagraph 2, of the Constitutional Interpretation Procedure Act. Pursuant to Paragraph 3 of said Article, the petition should be dismissed. This is hereby also clarified.

至於本件聲請人認最高行政法院八十九年度判字第二七五四號判決所適用之前開耕地租約登記辦法第二條、第四條、第五條有違憲疑義部分，查係爭執法院認事用法之當否，並未具體指摘該確定終局判決所適用之法令究有何牴觸憲法之處，核與司法院大法官審理案件法第五條第一項第二款規定不合，依同條第三項規定，應不受理，併此敘明。

J. Y. Interpretation No.562（July 11, 2003）*

ISSUE: Where the provision of Paragraph 1 of Article 34-1 of the Land Act that the disposal of or alteration to and the creation of encumbrance on co-owned land or construction may be effected only upon agreement of a majority of co-owners and the consent of those who own an aggregate of one half or more of the shares of such property is made applicable by Paragraph 5 thereof to joint ownership, a Ministry of Interior directive rules that such provision is not applicable to the disposal of or alteration to and the creation of encumbrance on the share of land or construction under ownership in common if such share is jointly owned by two or more persons. Is such rule in conflict with the Land Act and legally valid?

RELEVANT LAWS:

Articles 819, Paragraph 2, 820, 828, Paragraph 2 , and 830, Paragraph 1 of the Civil Code（民法第八百十九條第二項、第八百二十條、第八百二十八條第二項、第八百三十條第一項）; Article 34-1, Paragraphs 1, 2, 3, 4, 5 of the Land Act（土地法第三十四條之一第一項、第二項、第三項、第四項、第五項）; Clause 12 of the Guidelines for the Implementation of the amended Article 34-1 of the Land Act（土地法第三十四條之一執行要點第十二點）.

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* Translated by Raymond T. Chu.

** Contents within frame, not part of the original text, are added for reference purpose only.

KEYWORDS:

yung-tien（永佃）, *dien*（典）, superficies（地上權）, servitude（地役權）, co-ownership（共有權）, co-owners（共有人）, ownership in common（分別共有）, joint ownership（公同共有）, co-owned land（共有土地）, construction improvement（建築改良物）, shares（應有部分）, common property（共有物）, creation of encumbrance（設定負擔）, real property（不動產）, transactions in ownership to real property（不動產所有權交易）.**

HOLDING: The Land Act provides in Article 34-1, Paragraph 1: "The disposal of or alteration to and the creation of rights of superficies, yung-tien, servitude or dien on co-owned land or construction improvement thereon may be effected only upon agreement of a majority of co-owners and the consent of those who own an aggregate of one half or more of the shares of such land or construction improvement; where those who give their consent represent over two-thirds of all shares thereof, no count shall be made of the number of co-owners." Paragraph 5 of the same article provides that "the prescription set forth in the preceding four

解釋文：土地法第三十四條之一第一項規定：「共有土地或建築改良物，其處分、變更及設定地上權、永佃權、地役權或典權，應以共有人過半數及其應有部分合計過半數之同意行之。但其應有部分合計逾三分之二者，其人數不予計算。」同條第五項規定：「前四項規定，於公同共有準用之。」其立法意旨在於兼顧共有人權益之範圍內，促進共有物之有效利用，以增進公共利益。同條第一項所稱共有土地或建築改良物之處分，如為讓與該共有物，即係讓與所有權；而共有物之應有部分，係指共有人對共有物所有權之比例，性質上與所有權並無不同。是不動產之應有部分如屬公同共有者，其讓與自得依土

paragraphs shall apply mutatis mutandis to joint ownership." The purpose of the legislation is to promote the effective utilization of common property for the furtherance of public interest while protecting the right and interest of the co-owners. Where the co-owned land or construction improvement referred to in Paragraph 1 of said Article is disposed of by way of transfer of such common property, it is a conveyance of the ownership to such property; and the so-called share of a common property means the portion of the ownership to the common property owned by the co-owner, which is by nature the same as ownership. If the share of a real property is under joint ownership, the assignment thereof is of course subject to the provision of Paragraph 1 of Article 34-1 of the Land Act by mutatis mutandis application pursuant to Paragraph 5 thereof. Clause 12 of the Guidelines for the Implementation of the amended Article 34-1 of the Land Act as promulgated by the Ministry of Interior per Directive Tai (77) Nei-Ti-Tze No. 621767 dated August 18, 1988, provides that "where the share of land or construction under own-

地法第三十四條之一第五項準用第一項之規定。內政部七十七年八月十八日臺(77)內地字第六二一七六七號函頒修正之土地法第三十四條之一執行要點第十二點規定：「分別共有土地或建物之應有部分為數人所公同共有，公同共有人就該應有部分為處分、變更或設定負擔，無本法條第一項之適用」，於上開範圍內，就公同共有人公同共有不動產所有權之行使增加土地法上揭規定所無之限制，應不予適用。

ership in common is jointly owned by two or more persons, Paragraph 1 of this Article is not applicable to the disposal of or alteration to such share or creation of encumbrance thereon by the joint owners." To the extent that said clause imposes a restriction that does not exist in the Land Act provision cited above on the exercise by joint owners of their ownership to the jointly owned real property, it must be rendered invalid.

REASONING: Co-ownership is a system whereby the ownership of a thing belongs to two or more persons in conjunction and its existence is because of the need of society. As all co-owners have the one and same ownership, however, the exercise of the respective right of each co-owner is subject to correlative restraint (See the Civil Code, Art. 819, Par. 2; Art. 820 and Art. 828). Thus, the activities of using and receiving profits from and disposing of such common property will unavoidably be affected and even the free circulation of common property will be obstructed, thereby resulting in detriment to the social economy. The Land Act pro-

解釋理由書：共有乃一物之所有權由二人以上共同享有之制度，係基於社會生活需要而存在，然各共有人因均享有同一之所有權，其權利之行使遂受相互之限制（民法第八百十九條第二項、第八百二十條、第八百二十八條參照），自不免影響共有物用益及處分之順利進行，甚而有礙共有物之自由流通，致生社會經濟上之不利益。土地法第三十四條之一第一項至第五項規定：「共有土地或建築改良物，其處分、變更及設定地上權、永佃權、地役權或典權，應以共有人過半數及其應有部分合計過半數之同意行之。但其應有部分合計逾三分之二者，其人數不予計算。」「共有人依前項規定為處分、變更或設

vides in Article 34-1, Paragraphs 1 to 5: "The disposal of or alteration to and the creation of rights of superficies, yung-tien, servitude or dien on co-owned land or construction improvement may be effected only upon agreement of a majority of co-owners and the consent of those who own an aggregate of one half or more of the shares of such land or construction improvement; where those who give their consent represent over two-thirds of all shares thereof, no count shall be made of the number of co-owners," "A co-owner who makes disposal of or alteration or creates encumbrance under the preceding paragraph shall give other co-owners prior written notices or alternatively publish the same if it is impossible to give such notices," "The co-owners referred to in the first paragraph hereof shall be jointly and severally liable for payment of the consideration or compensation due other co-owners and shall present, when applying for recordation of change of the right, evidence to show that other co-owners have already received such consideration or compensation or the same has been deposited in court. Where a co-owner ac-

定負擔時，應事先以書面通知他共有人；其不能以書面通知者，應公告之。」「第一項共有人，對於他共有人應得之對價或補償，負連帶清償責任。於為權利變更登記時，並應提出他共有人已為受領或為其提存之證明。其因而取得不動產物權者，應代他共有人申請登記。」「共有人出賣其應有部分時，他共有人得以同一價格共同或單獨優先承購。」「前四項規定，於公同共有準用之。」其立法意旨係在於兼顧共有人之權益範圍內，排除民法第八百十九條第二項、第八百二十八條第二項規定之適用，以便利不動產所有權之交易，解決共有不動產之糾紛，促進共有物之有效利用，增進公共利益。

quires any right over immovables as a result of such disposal, alteration or creation of encumbrance, he shall apply for relevant recordation for and on behalf of the other co-owners," "Where a co-owner desires to sell his portion of the share, the other co-owners shall have the preemptive right to buy such portion of the share either individually or jointly at the same price as may be offered by other persons," "The provisions in the preceding four paragraphs shall apply mutatis mutandis to joint ownership." The purpose of the legislation is to facilitate transactions in ownership to real property, resolve disputes over co-owned immovables, and promote the effective utilization of common property for the furtherance of public interest while protecting the right and interest of co-owners by precluding the application of Article 819, Paragraph 2 and Article 828, Paragraph 2, of the Civil Code.

It must be noted that the share of a common property means the portion of the ownership owned by a co-owner of the common property, which is by nature

按應有部分乃共有人對共有物所有權之比例，性質上與所有權本無不同；而土地法第三十四條之一第一項所稱共有土地或建築改良物之處分，係與

the same as ownership. Under Paragraph 1 of Article 34-1 of the Land Act, disposal of co-owned land or construction improvement is subject to the same prescription along with alteration to and creation of rights of superficies, yung-tien, servitude or dien on such land and construction improvement. Thus, so far as transfer of the common property is concerned, the so-called disposal of the co-owned land or construction improvement means the conveyance of the ownership to such property. Likewise, the assignment of other rights over things to the common property means the disposal of such rights over things. If the provision of Paragraph 1 of Article 34-1 of the Land Act cited above is made applicable to assignment of the share of a real property under joint ownership, it will facilitate transactions in ownership to real propertyor, furthermore, either minimize the number of co-owners or eliminate the relationship of co-ownership to promote the effective utilization of common property and to bring about the legislative purpose of the Land Act as explained above. For this reason, Paragraph 1 of Article 34-1 of the Land

變更及設定地上權、永佃權、地役權或典權併列，是所謂共有土地或建築改良物之處分，就讓與該共有物言，即係讓與其所有權，共有物其他物權之讓與，亦屬該物權之處分。況公同共有不動產應有部分之讓與，若得準用土地法上揭第一項規定，亦可便利不動產所有權之交易，或進而減少共有人之人數或消滅共有關係，促進共有物之有效利用，實現土地法首揭規定之立法意旨。是以，公同共有不動產應有部分之讓與，自得依土地法第三十四條之一第五項準用第一項之規定。至公同共有人讓與公同共有之應有部分，係消滅該應有部分之公同共有關係（參照民法第八百三十條第一項），與公同共有人將公同共有變更登記為分別共有，係公同共有人間調整共有物內部之法律關係，兩者不同，不容混淆。內政部因執行土地法之規定，基於職權固得發布命令，為必要之釋示，然僅能就執行法律之細節性、技術性次要事項加以規定，其內容更不能牴觸土地法或增加其所無之限制。內政部七十七年八月十八日臺(77)內地字第六二一七六七號函頒修正之土地法第三十四條之一執行要點第十二點規定：「分別共有土地或建物之應有部分為數人所公同共有，公同共有人就該應有部分為

Act is certainly applicable in pursuance of Paragraph 5 thereof to assignment of the share of a real property under joint ownership. As regards the situation where the relationship of joint ownership to the shares of a jointly owned real property is nullified in consequence of transfer of such shares by the joint owners (See the Civil Code, Art. 830, Par. 1), it is distinguishable from the situation where joint owners cause the recordation of the joint ownership changed to ownership in common in that the joint owners in the latter case aim at adjusting the internal legal relationship of the common property. While the Ministry of Interior, for the purpose of implementing the Land Act provisions, has the power ex officio to issue decrees to give necessary interpretations and instructions, such decrees may only deal with details and technical matters in relation to the enforcement of the law and may neither contradict the Land Act nor add restrictions that do not exist in the Act. Clause 12 of the Guidelines for the Implementation of the Amended Article 34-1 of the Land Act as promulgated by the Ministry of Interior per Directive

處分、變更或設定負擔，無本法條第一項之適用」，於上開範圍內，就公同共有人公同共有不動產所有權之行使增加土地法上揭規定所無之限制，應不予適用。

Tai (77) Nei-Ti-Tze No. 621767 dated August 18, 1988, provides that "where the share of land or construction under ownership in common is jointly owned by two or more persons, paragraph 1 of this article is not applicable to the disposal of or alteration to such share or creation of encumbrance thereon by the joint owners." To the extent that said clause imposes a restriction that does not exist in the Land Act provision cited above on the exercise by joint owners of their ownership to the jointly owned real property, it must be rendered invalid.

J. Y. Interpretation No.563（July 25, 2003）*

ISSUE: Does either formulating a Qualification Exam Outline or punishing a student with expulsion exceed the scope of university self-government and violate the Constitution?

RELEVANT LAWS:

Articles 11, 23, 158 and 162 of the Constitution（憲法第十一條、第二十三條、第一百五十八條、第一百六十二條）; J.Y. Interpretation Nos. 380, 382 and 450（司法院釋字第三八〇號、第三八二號、第四五〇號解釋）; Articles 4, Paragraphs 1and 2, and 6, Paragraph 1 of the Act Governing the Conferment of Academic Degrees（學位授予法第四條第一項、第二項、第六條第一項）; Articles 1, Paragraph 1,17, Paragraphs 1 and 2, and 25, Paragraph 2 of the University Act（大學法第一條第一項、第十七條第一項、第二項、第二十五條第二項）; Articles 2, Paragraph 2, and 8, Paragraph 2 of the Education Basic Act（教育基本法第二條第二項、第八條第二項）; Article 2, Paragraph 1 of the National Chengchi University Master's Degree Examination Outline Regulation（國立政治大學研究生學位考試要點第二點第一項）; Department of Ethnology of National Chengchi University Qualification Exam Outline for Master's Degree Candidates（國立政治大學民族學系碩士班碩士候選人資格考試要點）.

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* Translated by Wei-Feng Huang of THY Taiwan International Law Offices.

** Contents within frame, not part of the original text, are added for reference purpose only.

KEYWORDS:

freedom of teaching（講學自由）, university self-government（大學自治）, scholastic aptitude evaluation（學力評鑑）, graduation requirements（畢業條件）, autonomy（自主權）, national morality（國民道德）, academic achievement（學業成績）, conference of school affairs（校務會議）, student petitions（學生申訴）.**

HOLDING: Freedom of teaching under Article 11 of the Constitution bestows upon universities the freedom to instruct, to conduct research and to learn, and the right of self-government in teaching, research, and other academic matters. In supervising universities, the government, according to Article 162 of the Constitution, shall formulate statutes to the extent that they follow the principle of university self-government. Legislative bodies shall not utilize the law to compel universities to establish particular units and infringe upon their autonomy of internal organization. Administrative agencies shall not utilize ordinances to interfere with the curriculum and syllabi of the universities, thus infringing upon the free-

解釋文：憲法第十一條之講學自由賦予大學教學、研究與學習之自由，並於直接關涉教學、研究之學術事項，享有自治權。國家對於大學之監督，依憲法第一百六十二條規定，應以法律為之，惟仍應符合大學自治之原則。是立法機關不得任意以法律強制大學設置特定之單位，致侵害大學之內部組織自主權；行政機關亦不得以命令干預大學教學之內容及課程之訂定，而妨礙教學、研究之自由，立法及行政措施之規範密度，於大學自治範圍內，均應受適度之限制（參照本院釋字第三八〇號及第四五〇號解釋）。

dom of instruction and research. The standard of legislative and administrative policies, to the extent consistent with university self-government, shall be properly constrained (See J.Y. Interpretations Nos. 380 and No. 450).

According to Article 6, Paragraph 1, of the Act Governing the Conferment of Academic Degrees amended and promulgated on April 27, 1994, "after completing the required courses, presenting a thesis, and passing the final examination given by the Committee on Master's Degree Examination," the graduate student shall receive a degree. This is the basic regulation of degree conferment as part of the government's supervision over universities. Since university self-government is institutionally protected by the Constitution, guaranteeing that the conferment of a degree maintains a certain standard, universities shall formulate related qualifications and conditions, to the extent reasonable and necessary, for those obtaining a degree. On June 14, 1996, National Chengchi University passed a Master's Degree Examination Outline Regulation: A

碩士學位之頒授依中華民國八十三年四月二十七日修正公布之學位授予法第六條第一項規定，應於研究生「完成碩士學位應修課程，提出論文，經碩士學位考試委員會考試通過」後，始得為之，此乃國家本於對大學之監督所為學位授予之基本規定。大學自治既受憲法制度性保障，則大學為確保學位之授予具備一定之水準，自得於合理及必要之範圍內，訂定有關取得學位之資格條件。國立政治大學於八十五年六月十四日訂定之國立政治大學研究生學位考試要點規定，各系所得自訂碩士班研究生於提出論文前先行通過資格考核（第二點第一項），該校民族學系並訂定該系碩士候選人資格考試要點，辦理碩士候選人學科考試，此項資格考試之訂定，未逾越大學自治之範疇，不生憲法第二十三條之適用問題。

graduate student from each master program shall pass the qualification exam before presenting his/her thesis (Article 2, Paragraph 1). The Department of Ethnology of this school also amended its Qualification Exam Outline for master's degree candidates. Establishing a subject test for master's degree candidates as part of the Qualification Exam Outline did not exceed the scope of university self-government; thus, there is no issue of applicability of Article 23 of the Constitution.

The University Act, as amended and promulgated on January 5, 1994, does not explicitly regulated student expulsion and its related matters. To maintain academic quality and nurture students' character, universities have the power and responsibility to examine students' academic achievement and conduct. According to the regulations stipulated by the procedures, the punishment of expulsion for students whose grades are below a certain standard or whose conduct has significantly deviated from proper behavior belongs to the category of university self-government. Legislative bodies shall for-

大學學生退學之有關事項，八十三年一月五日修正公布之大學法未設明文。為維持學術品質，健全學生人格發展，大學有考核學生學業與品行之權責，其依規定程序訂定有關章則，使成績未符一定標準或品行有重大偏差之學生予以退學處分，亦屬大學自治之範疇；立法機關對有關全國性之大學教育事項，固得制定法律予以適度之規範，惟大學於合理範圍內仍享有自主權。國立政治大學暨同校民族學系前開要點規定，民族學系碩士候選人兩次未通過學科考試者以退學論處，係就該校之自治事項所為之規定，與前開憲法意旨並無違背。大學對學生所為退學之處分行

mulate statutes to properly regulate, to the reasonable extent that universities are still entitled to the right of self-government, nation-wide university academic matters. National Chengchi University and its Department of Ethnology followed the above-mentioned specification: A degree candidate for Master of Ethnology, who does not pass after taking the subject test twice, should be expelled. Such regulation is a matter of self-government of this school and does not contradict the meaning of the aforesaid constitutional principle. Universities administering the punishment of expulsion have a great influence on the rights of the student. Certainly, the formulation and execution of related regulations shall follow proper procedures and their content should be reasonably appropriate.

為，關係學生權益甚鉅，有關章則之訂定及執行自應遵守正當程序，其內容並應合理妥適，乃屬當然。

REASONING: University self-government is within the scope protected by the freedom of teaching under Article 11 of the Constitution. Universities are entitled to the right of self-government in teaching, research, learning, and other academic matters, such as internal organi-

解釋理由書：大學自治為憲法第十一條講學自由之保障範圍，大學對於教學、研究與學習之學術事項，諸如內部組織、課程設計、研究內容、學力評鑑、考試規則及畢業條件等，均享有自治權。國家依憲法第一百六十二條對大學所為之監督，應以法律為之，並應

zation, curriculum models, research topics, scholastic aptitude evaluations, examination rules, and graduation requirements. In supervising universities, the government, according to Article 162 of the Constitution, shall formulate statutes to the extent that they follow the principle of university self-government in order to prevent improper intervention in university matters, further develop universities' characteristics, and achieve their purpose of increasing knowledge and nurturing talent. Legislative bodies shall not utilize the law to compel universities to establish particular units and infringe upon their autonomy of internal organization. Administrative agencies shall not utilize ordinances to interfere with the curriculum and syllabi of the universities, thus infringing upon the freedom of instruction and research. The standard of legislative and administrative policies, to the extent consistent with university self-government, shall be properly constrained. The agency-in-charge of education is also merely in the position of exercising legitimate supervision over university operations (See J.Y. Interpretations Nos. 380 and 450).

符合大學自治之原則，俾大學得免受不當之干預，進而發展特色，實現創發知識、作育英才之大學宗旨。是立法機關不得任意以法律強制大學設置特定之單位，致侵害大學之內部組織自主權，行政機關亦不得以命令干預大學教學之內容及課程之訂定，而妨礙教學、研究之自由，立法及行政措施之規範密度，於大學自治範圍內，均應受適度之限制，教育主管機關對大學之運作亦僅屬於適法性監督之地位（參照本院釋字第三八〇號及第四五〇號解釋）。

The purpose of universities is to do academic research, educate individuals, promote culture, serve the society, and encourage the nation's development (University Act, Article 1, Paragraph 1). As educational institutions, universities have the mission to encourage national morality and cultivate students' good character (See Article 158 of the Constitution and the Education Basic Act, Article 2, Paragraph 2). The University Act, amended and promulgated on January 5, 1994, does not explicitly regulate the matter of student expulsion. To fulfill the purpose of a college education, universities have the power and responsibility to examine students' academic achievement and conduct. According to the regulations stipulated by the procedures, the punishment of expulsion for students whose grades are below a certain standard or whose conduct has significantly deviated from proper behavior belongs to the category of university self-government. Legislative bodies shall formulate statutes to properly regulate, to the reasonable extent that universities are still entitled to the right of self-government, nation-wide university

大學以研究學術、培育人才、提升文化、服務社會、促進國家發展為宗旨（大學法第一條第一項）。大學作為教育機構並肩負發展國民道德、培養學生健全人格之任務（憲法第一百五十八條及教育基本法第二條第二項參照）。八十三年一月五日修正公布之大學法關於大學學生之退學事項未設明文，惟為實現大學教育之宗旨，有關學生之學業成績及品行表現，大學有考核之權責，其依規定程序訂定章則，使成績未符一定標準或品行有重大偏差之學生予以退學處分，屬大學自治之範疇；立法機關對有關全國性之大學教育事項，固得制定法律予以適度之規範，惟大學於合理範圍內仍享有自主權。國立政治大學暨同校民族學系前開要點規定，民族學系碩士候選人兩次未通過學科考試者以退學論處，係就該校之自治事項所為之規定，與前開憲法意旨並無違背。

academic matters. National Chengchi University and its Department of Ethnology followed the above-mentioned specification: A degree candidate for Master of Ethnology, who does not pass after taking the subject test twice, should be expelled. Such regulation is a matter of self-government of this school and does not contradict the meaning of the aforesaid constitutional principle.

According to the Act Governing the Conferment of Academic Degrees, amended and promulgated on May 6, 1983, a graduate student shall "study for more than two years, finish the required classes and thesis, pass all the subjects, and be selected as a candidate for a master's degree" (Article 4, Paragraph 1); moreover, "the candidate must pass the final examination and be qualified by the Ministry of Education" (Article 4, Paragraph 2), then the university will confer upon him/her a master's degree. The above provision was amended on April 27, 1994, to read: "graduate students from universities' master's degree programs, after completing the required courses, presenting a thesis,

有關碩士學位之頒授，七十二年五月六日修正公布之學位授予法規定，研究生須「修業二年以上，並完成碩士學位應修課程及論文，經考核成績及格者，得由該所提出為碩士學位候選人」（第四條第一項），「碩士學位候選人考試通過，經教育部覆核無異者」，由大學授予碩士學位（同條第二項）。上開規定於八十三年四月二十七日修正為「大學研究所碩士班研究生，完成碩士學位應修課程，提出論文，經碩士學位考試委員會考試通過者，授予碩士學位」（第六條第一項），其意旨係免除教育部之覆核程序，提高大學頒授學位之自主權，因而僅就學位之授予為基本之規定。該條文雖刪除「經考核成績及格者」並將「碩士學位候選人考試通

and passing the final examination given by the Committee on Master's Degree Examination, shall receive a master's degree" (Article 6, Paragraph 1). The purpose was to preclude the qualification procedure by the Ministry of Education, enhance the right of self-government of the universities in conferring a degree, and set the conferment of a degree as a basic regulation. Such clause "pass all the subjects" has been removed, and "the candidate must pass the final examination" has been amended to "passing the final examination given by the Committee on Master's Degree Examination." Although the aforesaid changes have been made and since university self-government is institutionally protected by the Constitution, guaranteeing that the conferment of a degree maintains a certain standard, universities shall formulate related qualifications and conditions, to the extent reasonable and necessary, for those obtaining a degree. The University Act, Article 25, Paragraph 2, which states: "For graduate students from the Master's or Ph.D. programs, who have fulfilled the study requirements and passed all the subjects,

過」修正為「經碩士學位考試委員會考試通過者」，惟大學自治既受憲法制度性保障，則大學為確保學位之授予具備一定之水準，自得於合理及必要之範圍內，訂定有關取得學位之資格條件。前開大學法第二十五條第二項規定：「碩士班、博士班研究生修業期滿，經考核成績合格，由大學分別授予碩士、博士學位」，亦同此意旨。國立政治大學校務會議於八十五年六月十四日通過之國立政治大學研究生學位考試要點規定，各系所得自訂碩士班研究生於提出論文前先行通過資格考核（第二點第一項），該校民族學系並於八十五年九月十九日修訂該系碩士候選人資格考試要點，辦理碩士候選人學科考試，此項資格考試要點之訂定，未逾越大學自治之範疇，不生憲法第二十三條之適用問題。

such university shall confer a Master's or a Ph.D. degree, respectively," follows the same principle. During the Conference of School Affairs in National Chengchi University on June 14, 1996, the school passed a Master's Degree Examination Outline Regulation: A graduate student from each master's degree program shall pass the qualification exam before presenting his/her thesis (Article 2, Paragraph 1). The Department of Ethnology from this school also amended its Qualification Exam Outline for master's degree candidates on September 19, 1996. Establishing a subject test for master's degree candidates as part of the Qualification Exam Outline did not exceed the scope of university self-government; thus, there is no issue of applicability of Article 23 of the Constitution.

The students' right to learn and be educated shall be protected by the government (Education Basic Act, Article 8, Paragraph 2). Universities administering the punishment of expulsion or of any other kind of punishment alter the status of the student and his or her right to be

學生之學習權及受教育權，國家應予保障（教育基本法第八條第二項）。大學對學生所為退學或類此之處分，足以改變其學生身分及受教育之權利，關係學生權益甚鉅（本院釋字第三八二號解釋參照）。大學依其章則對學生施以退學處分者，有關退學事由及相

educated, which is directly associated with the rights of the student (See J.Y. Interpretation No. 382). When punishing a student with expulsion according to university regulations, the cause of expulsion and rules of related matters shall be reasonably appropriate, and their formulation and execution shall follow proper procedures. Article 17, Paragraph 1, of the University Act states: "To enhance the educational effect of universities, an elected student representative shall attend the Conference of School Affairs and any other conference associated with academics, life, and formulation of rules related to reward and punishment." Paragraph 2 from the same Article states: "Universities shall safeguard and assist students to form autonomous associations, manage any affairs related to student learning, life, and rights in school, and establish a system for student petitions to protect students' rights." Certainly, universities shall follow the rules related to the formulation of regulations and student petitions.

關內容之規定自應合理妥適，其訂定及執行並應踐履正當程序。大學法第十七條第一項：「大學為增進教育效果，應由經選舉產生之學生代表出席校務會議，並出席與其學業、生活及訂定獎懲有關規章之會議。」同條第二項：「大學應保障並輔導學生成立自治團體，處理學生在校學習、生活與權益有關事項；並建立學生申訴制度，以保障學生權益」，係有關章則訂定及學生申訴之規定，大學自應遵行，乃屬當然。

Justice Lai, In-Jaw filed concurring opinion.

本號解釋賴大法官英照提出協同意見書。

J. Y. Interpretation No.564（August 8, 2003）*

ISSUE: Does an administrative agency in charge of traffic control have the authority to permit or prohibit the placement of vendors' stalls on arcades for the purpose of maintaining the orderly flow of traffic, thereby restraining the property right of the owners of the land on which the arcades are set up, if it is so specifically authorized by law?

RELEVANT LAWS:

Articles 15 and 23 of the Constitution（憲法第十五條、第二十三條）; J. Y. Interpretation No. 511（司法院釋字第五一一號解釋）; Articles 3, Subparagraph 1, 82, Paragraph 1, Subparagraph 10, and 83, Subparagraph 2 of the Act Governing the Punishment for Violation of Road Traffic Regulations（道路交通管理處罰條例第三條第一款、第八十二條第一項第十款、第八十三條第二款）.

KEYWORDS:

public interest（公共利益）, stall, vendor's stand（攤位）, principle of proportionality（比例原則）.**

HOLDING: Article 15 of the Constitution contains explicit words stating that the people shall be guaranteed the

解釋文：人民之財產權應予保障，憲法第十五條設有明文。惟基於增進公共利益之必要，對人民依法取得之

* Translated by Raymond T. Chu.

** Contents within frame, not part of the original text, are added for reference purpose only.

right of property. Taking into consideration the necessity in the furtherance of the public interest, however, the state is not prohibited from prescribing by law reasonable restraints on land ownership lawfully acquired by the people. Under the Act Governing the Punishment for Violation of Road Traffic Regulations, Article 82, Paragraph 1, Subparagraph 10, the competent authority may order a person who sets up a stall at a place where no stalls are permitted to take down the stall and get rid of any obstruction to traffic and may, in addition thereto, impose on such person or his employer a fine of not less than 1,200 and not more than 2,400 New Taiwan Dollars. While this constitutes a restriction on the exercise of the property right of the landowner in the case of private land, the purpose of such restriction is to ensure unobstructed traffic of pedestrians and vehicles and the impact thereof on land utilization is rather insignificant. Hence, such restriction has not gone beyond the principle of proportionality and is not in conflict with the purpose of the Constitution in protecting the right of property.

土地所有權，國家並非不得以法律為合理之限制。道路交通管理處罰條例第八十二條第一項第十款規定，在公告禁止設攤之處擺設攤位者，主管機關除責令行為人即時停止並消除障礙外，處行為人或其雇主新台幣一千二百元以上二千四百元以下罰鍰，就私有土地言，雖係限制土地所有人財產權之行使，然其目的係為維持人車通行之順暢，且此限制對土地之利用尚屬輕微，未逾越比例原則，與憲法保障財產權之意旨並無牴觸。

Where the act of announcement of an administrative agency imposes any restraint on the exercise of the property right of the people, the elements and standard required of such act of announcement must be specifically and clearly prescribed by law. The power granted to an administrative agency by the Act Governing the Punishment for Violation of Road Traffic Regulations, Article 82, Paragraph 1, Subparagraph 10, to announce the prohibition of setting up stalls is certainly limited to the degree necessary for maintaining orderly traffic flow. Inasmuch as arcade is defined by Article 3, Subparagraph 1, of said Act to be a passageway, its owner has the duty from the beginning of its construction to provide for public passage, and it is in principle not usable for setting up vendors' stalls without permission. To the extent that the announcement of the competent authority to grant or prohibit permission for the placement of stalls on such passageways based on the authority granted by the aforesaid provision (See Article 83, Subparagraph 2, of the Act) constitutes a restraint on the exercise of the property right of the people,

行政機關之公告行為如對人民財產權之行使有所限制，法律就該公告行為之要件及標準，須具體明確規定，前揭道路交通管理處罰條例第八十二條第一項第十款授予行政機關公告禁止設攤之權限，自應以維持交通秩序之必要為限。該條例第三條第一款所稱騎樓既屬道路，其所有人於建築之初即負有供公眾通行之義務，原則上未經許可即不得擺設攤位，是主管機關依上揭條文為禁止設攤之公告或為道路擺設攤位之許可（參照同條例第八十三條第二款），均係對人民財產權行使之限制，其公告行為之作成，宜審酌准否設攤地區之交通流量、道路寬度或禁止之時段等因素而為之，前開條例第八十二條第一項第十款規定尚欠具體明確，相關機關應儘速檢討修正，或以其他法律為更具體之規範。

such act of announcement may be done only upon taking into account such factors as the traffic flow and width of the road in the area where stalls are prohibited or permitted and the specific hours during which stalls are prohibited. The provision of said Article 82, Paragraph 1, Subparagraph 10, being insufficiently specific and clear, the competent authority must make prompt review and revision of the provision or alternatively make more specific prescription through the enactment of separate laws.

REASONING: Article 15 of the Constitution contains explicit words stating that the people shall be guaranteed the right of property. Taking into consideration the necessity in the furtherance of the public interest, however, the state is not prohibited from prescribing by law reasonable restraints on land ownership lawfully acquired by the people. Nevertheless, the question of how far such restraints may go so that they will not exceed the degree of toleration which the property right of the people should undergo must be weighed against the pur-

解釋理由書：人民之財產權應予保障，憲法第十五條設有明文。惟基於增進公共利益之必要，對人民依法取得之土地所有權，國家並非不得以法律為合理之限制，此項限制究至何種程度始逾人民財產權所應忍受之範圍，應就行為之目的與限制手段及其所造成之結果予以衡量，如手段對於目的而言尚屬適當，且限制對土地之利用至為輕微，則屬人民享受財產權同時所應負擔之社會義務，國家以法律所為之合理限制即與憲法保障人民財產權之本旨不相牴觸。

pose of the act, the means of restriction, and the impact of such restraint. If the means is appropriate in relation to the purpose, and the impact of the restriction on the use of the land is rather insignificant, then such restriction is a social obligation that the people should assume while enjoying the right of property, and the restriction, being imposed by the state under law to a reasonable degree, is not in conflict with the purpose of the Constitution in protecting the property right of the people.

While the owner of an arcade constructed so as to allow passage by the public is not deprived of his right and capacity to manage, make use of, collect profits from, and dispose of the same, his act of utilization thereof should not in principle obstruct the passage. This is the reason for which it is included in the Act Governing the Punishment for Violation of Road Traffic Regulations, Article 3, Subparagraph 1, as a road to be put under control thereunder. Under said Act, Article 82, Paragraph 1, Subparagraph 10, the competent authority may order a person who

騎樓通道建造係為供公眾通行之用者，所有人雖不因此完全喪失管理、使用、收益、處分之權能，但其利用行為原則上不得有礙於通行，道路交通管理處罰條例第三條第一款即本此而將騎樓納入道路管制措施之適用範圍。同條例第八十二條第一項第十款規定在公告禁止設攤之處擺設攤位者，主管機關除責令行為人即時停止並消除障礙外，並處行為人或其雇主新台幣一千二百元以上二千四百元以下罰鍰；又依同條例第八十三條第二款，未經許可在道路擺設攤位不聽勸阻者，處所有人新台幣三百元以上六百元以下罰鍰，並責令撤除。

sets up a stall at a place where no stalls are permitted to take down the stall and get rid of any obstruction to traffic and may, in addition thereto, impose on such person or his employer a fine of not less than 1,200 and not more than 2,400 New Taiwan Dollars. Furthermore, under Article 83, Subparagraph 2, of said Act, a person who sets up a stall on the passageway or road and refuses to take it down may be fined for an amount of not less than 300 and not more than 600 New Taiwan Dollars and may additionally be ordered to remove the stall. All such provisions are designed to put a restriction on setting up stalls on arcades to ensure unobstructed traffic flow and are thus appropriate. Although the announcement of the competent authority issued under Article 82, Paragraph 1, Subparagraph 10, of said Act to prohibit the setting up of stalls on particular roads or sections of roads is intended to raise the amounts of fine for the purpose of strengthening traffic control rather than imposing a restraint on the property right of the people, its application to individual cases does result in restraint on the property right of the people.

上述規定均以限制騎樓設攤，維護道路暢通為目的，尚屬適當。主管機關依上開條例第八十二條第一項第十款之規定公告禁止在特定路段設攤，係以提高罰鍰以加強交通管理，雖皆非為限制人民財產權而設，然適用於具體個案則有造成限制人民財產權之結果。故於衡酌其限制之適當性外，並應考量所造成損害之程度。按上開規定所限制者為所有權人未經許可之設攤行為，所有權人尚非不能依法申請准予設攤或對該土地為其他形式之利用。再鑑於騎樓所有人既為公益負有社會義務，國家則提供不同形式之優惠如賦稅減免等，以減輕其負擔。從而人民財產權因此所受之限制，尚屬輕微，自無悖於憲法第二十三條比例原則之要求，亦未逾其社會責任所應忍受之範圍，更未構成個人之特別犧牲，難謂國家對其有何補償責任存在，與憲法保障人民財產權之規定並無違背。

Thus, when considering the appropriateness of such restraint, the degree of damage it may cause must also be taken into account. To the extent that the act of the owner bound by the restrictive provisions cited above is the setting up of a stall without permission, the owner is not banned from filing an application under law for a permit to set up a stall or to make other use of the land. Furthermore, in light of the social responsibility assumed by the owner of an arcade for public interest, the state is offering various types of incentives such as tax exemption or reduction to alleviate his burden. This makes the restraint on the property right of the people rather insignificant and is thus not in conflict with the principle of proportionality embodied in Article 23 of the Constitution; nor does it go beyond the degree of toleration that should be taken in light of social responsibility or call for any special sacrifice from individuals for which the state is bound to provide compensation. We do not find such restriction to be contrary to the Constitutional provision for protecting the property right of the people.

We have made it repeatedly clear in our Interpretations that if the act of the state involves any constraint on the exercise of any right of the people, the prerequisites for taking such act must be explicitly prescribed by law and that when an administrative agency is authorized by law to issue relevant ordinances or to take any action the law must be clear and specific. As the Act Governing the Punishment for Violation of Road Traffic Regulations grants an administrative agency under Article 82, Paragraph 1, Subparagraph 10, the power to issue announcements to prohibit the setting up of stalls and under Article 83, Subparagraph 2, the authority to permit the setting up of stalls, such announcements issued by an administrative agency under said provisions to prohibit or permit the placement of stalls, to the extent that it affects the exercise of the property right of the people, may be made only after realistic review of such factors as the traffic flow and width of the road in the respective area open or closed for stalls and the hours during which stalls are prohibited or permitted (e.g., holidays, festivals) in light of the legislative pur-

國家之行為如涉及限制人民權利之行使者，其要件應以法律明文定之，如授權行政機關發布相關命令或作成處分行為，其規定應具明確性，迭經本院解釋闡明在案。前揭道路交通管理處罰條例第八十二條第一項第十款授予行政機關公告禁止設攤之權限，同條例第八十三條第二款則授予行政機關為道路擺設攤位之許可，是行政機關依上開規定授權公告禁止設攤或許可擺設攤位，既均對人民財產權之行使有所影響，自應就前開條例維持交通安全秩序之立法目的，具體審酌准否設攤地區之交通流量、道路寬度、准否之時段（如特定節慶活動）等因素而為之，方副前述解釋意旨。準此，上開道路交通管理處罰條例第八十二條第一項第十款與第八十三條第一項第二款規定，就作成公告禁止設攤或許可設攤處分之構成要件，尚未達於類型化之明確程度，為使主管機關從事符合於立法本旨之適當管制，相關機關應依本解釋意旨儘速檢討修正補充上開條例，或以其他法律為更具體之規定，俾便主管機關維護交通秩序之同時，兼顧人民之權益。又道路交通管理處罰條例以到案日期為提高罰鍰下限額度之標準，此屬法律授權主管機關就裁罰事宜所訂定之裁量基準，並未違反法

pose of said Act for maintaining a safe, orderly traffic flow to make them consistent with the essence of our opinion given above. That being so, we do not believe that the provisions of the Act Governing the Punishment for Violation of Road Traffic Regulations, Article 82, Paragraph 1, Subparagraph 10, and Article 83, Subparagraph 2, are sufficiently clear and precise by way of categorization of the elements required for issuing announcements to prohibit or permit vendors' stalls. To enable the competent authority to maintain appropriate control consistent with the legislative purpose, the authorities concerned must make prompt review and revision of and supplement to such provisions or alternatively make more specific prescriptions through the enactment of separate laws, so that the competent authority may take into account the rights of the people while maintaining the orderly flow of traffic. Incidentally, it has been made clear by this Yuan in our Interpretation No. 511 that the guideline set forth in said Act by which the minimum amount of fine is raised based on the date the traffic violator appears before the au-

律保留原則，於憲法保障人民財產權之意旨亦無牴觸，業經本院釋字第五一一號解釋在案，併此敘明。

thority provides a criterion of penalty established by the competent authority within its power of discretion authorized by law and that such guideline is not in conflict with the principle of reservation of law *(Gesetzesvorbehalt)*; nor is it contrary to the spirit of the Constitution in protecting the people's right to property.

Justice Tieh-Cheng Liu filed concurring opinion, in which Justice Lai, In-Jaw joined.

本號解釋劉大法官鐵錚與賴大法官英照共同提出協同意見書。

J. Y. Interpretation No.565（August 15, 2003）*

ISSUE: Is the Ministry of Finance directive in conflict with the doctrine of taxation by law embodied in Article 19 of the Constitution and the principle of equality in taxation set forth in Article 7 of the Constitution by allowing income tax relief to individuals selling listed stocks through securities transactions?

RELEVANT LAWS:

Articles 7 and 19 of the Constitution（憲法第七條、第十九條）; Article 27 of the Act of Encouragement of Investment（獎勵投資條例第二十七條）; Clause 5 of the Precautionary Matters on the Imposition of Capital Gain Tax for Securities（證券交易所得課徵所得稅注意事項第五項）.

KEYWORDS:

differential prescriptions/treatments（差別規定／待遇）, income from securities transactions（證券交易所得）, income from transactions in property（財產交易所得）, listed stocks（上市股票）, tax reduction and exemption（稅捐減免）, tax benefit/relief（稅捐優惠）, securities market（證券市場）, capital market（資本市場）, doctrine of taxation（租稅法定主義）, securities transaction tax（證券交易稅）, capital gain tax for securities（證券交易所得稅）, marketable securities（有價證券）, equal standing in substance be

* Translated by Raymond T. Chu.

** Contents within frame, not part of the original text, are added for reference purpose only.

fore the law（法律上地位實質平等）, principle of equality in taxation（租稅平等原則）, actual taxpaying ability（實質稅負能力）.**

HOLDING: The Constitution provides in Article 19: "The people shall have the duty to pay taxes as prescribed by law" and in Article 7 "All citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law." Where reasonable differential prescriptions are made by the state with respect to the imposition, reduction or exemption of taxes based on legally required elements or ordinances issued by administrative agencies upon specific and unequivocal authorization of law, with legitimate reasons, such prescriptions are not contrary to the principle of taxation by law and the principle of equality.

解釋文：憲法第十九條規定：「人民有依法律納稅之義務。」第七條規定：「中華民國人民，無分男女、宗教、種族、階級、黨派，在法律上一律平等。」國家對人民稅捐之課徵或減免，係依據法律所定要件或經法律具體明確授權行政機關發布之命令，且有正當理由而為合理之差別規定者，與租稅法定主義、平等原則即無違背。

Clause 5 of the Precautionary Matters on the Imposition of Capital Gain Tax for Securities promulgated by the Ministry of Finance on October 29, 1988, per

財政部於中華民國七十七年十月二十九日以台財稅字第七七〇六六五一四〇號函發布經行政院核定之證券交易所得課徵所得稅注意事項第五項規定：

directive Tai-Tsai-Shue-Tze No. 770665140 as approved by the Executive Yuan provides that "imposition of income tax on revenue earned by individuals from the sale of listed stocks acquired after January 1, 1989, will continue to be suspended for two years from January 1, 1989 till December 31, 1990, if the gross annual sales amount does not exceed ten million New Taiwan dollars; however, any loss that may have been incurred during such period as a result of securities transactions is not deductible from the amount of income from transactions in property." The provision is based upon authorization granted by Article 27 of the Act of Encouragement of Investment (automatically annulled as of December 31, 1990, upon expiration of its period of enforcement) to administrative agencies to accord individuals selling securities tax benefits within a defined limit for their income from transactions by taking into account the need for economic development and capital formation as well as the condition of the securities market, and is therefore not in conflict with the principle of taxation by law as embodied in Article 19 of

「個人出售民國七十八年一月一日以後取得之上市股票，其全年出售總金額不超過新臺幣壹千萬元者，其交易所得自民國七十八年一月一日起至七十九年十二月三十一日止，繼續停徵所得稅兩年。但停徵期間所發生之證券交易損失，不得自財產交易所得中扣除」，係依據獎勵投資條例（已於七十九年十二月三十一日因施行期間屆滿而當然廢止）第二十七條授權行政機關視經濟發展、資本形成之需要及證券市場之狀況，對個人出售證券，在一定範圍內，就其交易所得所採行之優惠規定，與憲法第十九條所定租稅法定主義尚無牴觸。又此項停徵證券交易所得稅，係行政機關依法律授權，為增進公共利益，權衡經濟發展階段性需要與資本市場實際狀況，本於專業之判斷所為合理之差別規定，與憲法第七條平等原則亦無違背。

the Constitution. Moreover, the suspension of income tax assessment on securities transactions under such provision represents a reasonable differential prescription made by an administrative agency under authorization of law based upon its professional judgment of the interim needs for economic development and the actual condition of the capital market for the purpose of promoting the public interest, and is not contrary to the principle of equality under Article 7 of the Constitution.

REASONING: The Constitution provides in Article 19: "The people shall have the duty to pay taxes as prescribed by law" and in Article 7 "All citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law." Where reasonable differential prescriptions are made by the state with respect to the imposition, reduction or exemption of taxes based on legally required elements or ordinances issued by administrative agencies upon specific and unequivocal authorization of law, with legitimate reasons, such pre-

解釋理由書：憲法第十九條規定：「人民有依法律納稅之義務。」第七條規定：「中華民國人民，無分男女、宗教、種族、階級、黨派，在法律上一律平等。」國家對人民稅捐之課徵或減免，係依據法律所定要件或經法律具體明確授權行政機關發布之命令，且有正當理由而為合理之差別規定者，與租稅法定主義、平等原則即無違背。

scriptions are not contrary to the principle of taxation by law and the principle of equality.

The Act of Encouragement of Investment (automatically annulled as of December 31, 1990, upon expiration of its period of enforcement) was enacted for the purpose of encouraging investments to accelerate the economic development of the country through tax reduction and exemption and other incentive measures. Article 27 of the Act provided that "to promote the development of the capital market, the Executive Yuan may, taking into account the needs for economic development and capital formation and the condition of the securities market, decide to suspend temporarily the levying in whole or in part of the securities transaction tax for marketable securities and to suspend temporarily the levying in whole or in part of the capital gain tax for securities otherwise payable by persons not in the business of marketable securities trading; however, no deduction may be allowed from the amount of income for any loss suffered during such period of sus-

獎勵投資條例（已於七十九年十二月三十一日因施行期間屆滿而當然廢止）係以稅捐減免等優惠措施，獎勵投資活動，加速國家經濟發展而制定。該條例第二十七條規定：「為促進資本市場之發展，行政院得視經濟發展及資本形成之需要及證券市場之狀況，決定暫停徵全部或部分有價證券之證券交易稅，及暫停徵全部或部分非以有價證券買賣為專業者之證券交易所得稅。但於停徵期間因證券交易所發生之損失，亦不得自所得額中減除。」財政部於七十七年十月二十九日以台財稅字第七七〇六六五一四〇號函發布經行政院同年月二十日台七十七財字第二八六一六號函核定之證券交易所得課徵所得稅注意事項第五項規定：「個人出售民國七十八年一月一日以後取得之上市股票，其全年出售總金額不超過新臺幣壹千萬元者，其交易所得自民國七十八年一月一日起至七十九年十二月三十一日止，繼續停徵所得稅兩年。但停徵期間所發生之證券交易損失，不得自財產交易所得中扣除」，乃基於獎勵投資條例之授

pension by reason of securities transactions." Based upon the authorization of the Act of Encouragement of Investment and upon Executive Yuan approval per letter Tai(77) Tsai-Tze No. 28616 dated October 20, 1988, the Ministry of Finance issued on October 29, 1988, the Precautionary Matters on the Imposition of Capital Gain Tax for Securities per directive Tai-Tsai-Shue-Tze No. 770665140 which provides in Article 5 that "the imposition of income tax on revenue earned by individuals from sale of listed stocks acquired after January 1, 1989, will continue to be suspended for two years from January 1, 1989 till December 31, 1990, if the gross annual sales amount does not exceed ten million New Taiwan dollars; however, any loss that may have been incurred during such period as a result of securities transactions is not deductible from the amount of income from transactions in property." The provision is intended to accord individuals selling securities tax benefits within a defined limit for their income from transactions for the purpose of promoting the development of the capital market and is consistent with the legis-

權，為促進資本市場之發展，對個人出售之證券，在一定範圍內，就其交易所得所採行之優惠規定，符合前開條例對稅捐減免優惠限於非以有價證券買賣為專業者之立法意旨，與憲法第十九條租稅法定主義尚無牴觸。

lative purpose of the above Act in granting tax reduction and exemption only to the persons not in the business of marketable securities trading, and is therefore not in conflict with the principle of taxation by law as embodied in Article 19 of the Constitution.

It must be noted that the principle of equality laid down by Article 7 of the Constitution is not an absolute and inflexible equality in form. Rather, it means to guarantee people an equal standing in reality before the law. While taxpayers should, under the principle of equality in taxation, pay taxes which they are supposed to pay according to their actual tax-paying ability, it is not forbidden by Article 7 of the Constitution to specify, with reasonable cause, differential treatments by way of exceptions or special provisions within the scope of discretion authorized by law to grant taxpayers of a particular class tax benefits in the form of tax reduction or exemption in order to promote the public interest. To the extent that Clause 5 of the above-cited Precautionary Matters provides for the suspension of the imposi-

憲法第七條平等原則並非指絕對、機械之形式上平等，而係保障人民在法律上地位實質平等。依租稅平等原則納稅義務人固應按其實質稅負能力，負擔應負之稅捐。惟為增進公共利益，依立法授權裁量之範圍，設例外或特別規定，給予特定範圍納稅義務人減輕或免除租稅之優惠措施，而為有正當理由之差別待遇者，尚非憲法第七條規定所不許。前開課徵所得稅注意事項第五項明定僅停徵一定證券交易金額者之證券交易所得稅，其所採租稅優惠措施，係行政機關依法律授權，為增進公共利益，權衡經濟發展階段性需要與資本市場實際狀況，本於專業之判斷所為合理之差別規定，與憲法第七條平等原則亦無違背。

tion of the capital gain tax for securities up to a specified amount only, the tax relief so allowed represents a reasonable differential measure taken by an administrative agency under authorization of law based upon its professional judgment of the interim needs for economic development and the actual condition of the capital market for the purpose of promoting the public interest, and is thus consistent with the principle of equality embodied in Article 7 of the Constitution.

J. Y. Interpretation No.566（September 26, 2003）*

ISSUE: The Agricultural Industry Development Act provides that a successor capable of self-tilling who inherits or accepts agricultural land used as a family farm and continues to engage in agricultural production is exempt from estate tax or gift tax. However, the Enforcement Rules of said Act provide that agricultural land used as a family farm does not include land that was legally classified for non-agricultural use before it was inherited or given as a gift, and a Ministry of Finance directive further defines that where the decedent died or the fact of giving the land as a gift occurred after the Enforcement Rules of said Act became effective, no estate tax or gift tax may be exempted for such land. Do said enforcement rules and directive add restrictions that are not prescribed by law and are they thus in conflict with the Constitution?

RELEVANT LAWS:

Articles 19 and 23 of the Constitution（憲法第十九條、第二十三條）; J. Y. Interpretation Nos. 210, 313, 367, 385, 413, 415 and 458（司法院釋字第二一〇號、第三一三號、第三六七號、第三八五號、第四一三號、第四一五號、第四五八號解釋）; Articles 3, Subparagraphs 10 and 11, 30 and 31, the first sentence of the Agricultural Industry Development Act as amended on August 1, 1983（農業發展條例第三條第十

* Translated by Raymond T. Chu.
** Contents within frame, not part of the original text, are added for reference purpose only.

款、第十一款、第三十條、第三十一條前段（七十二年八月一日修正公布）, Articles 2 and 31 of the Agricultural Industry Development Act as amended on January 6, 1986（農業發展條例第二條、第三十一條（七十五年一月六日修正公布）, Articles 16, 20,21and 22 of the Agricultural Industry Development Act as amended on January 26, 2000（農業發展條例第十六條、第二十條、第二十一條、第二十二條（八十九年一月二十六日修正公布））; Article 83 of the Land Act（土地法第八十三條）; Articles 17 and 20 of the Estate and Gift Tax Act（遺產及贈與稅法第十七條、第二十條）; Article 21, the second sentence of the Enforcement Rules of the Agricultural Industry Development Act as amended on September 7, 1984（農業發展條例施行細則第二十一條後段（七十三年九月七日修正發布））; Ministry of Finance directive Tai-Tsai-Shui No. 62717 dated November 8, 1984（財政部七十三年十一月八日臺財稅第六二七一七號函）; Ministry of Finance directive Tai-Tsai-Shui No. 830625682 of November 29, 1994（財政部八十三年十一月二十九日臺財稅字第八三〇六二五六八二號函）.

KEYWORDS:

agricultural land（農業用地）, family farm（家庭農場）, non-agricultural use（非農業使用）, estate tax（遺產稅）, gift tax（贈與稅）, the law then in force（當時有效之法令）, general authorization（概括授權）, doctrine of taxation per legislation（租稅法律主義）, principle of preservation of law (*Gesetzesvorbehalt)*（法律保留原則）, tax reduction or

exemption（租稅減免）, arbitrarily expanded or abridged（任意擴張、縮減）, unity of application of law（法律適用之整體性）, construction as a whole（整體性闡釋）, defining prescription（定義性規定）, interpretative administrative regulations（解釋性之行政規則）, arable land（耕地）.**

HOLDING: The Agricultural Development Act as amended on August 1, 1983, provides in Article 31, the first sentence, that a successor capable of self-tilling who inherits or accepts agricultural land being used as a family farm and continues to engage in agricultural production is exempt from estate tax or gift tax, as the case may be. However, the Enforcement Rules of said Act, as amended on September 7, 1984, provide in Article 21, the second sentence: "Agricultural land used as a family farm does not include land that was legally classified for non-agricultural use before it was inherited or given as a gift." And the Ministry of Finance directive Tai-Tsai-Shui No. 62717 dated November 8, 1984, further defines that "Where the decedent died or the fact of giving the land as a gift occurred after the

解釋文：中華民國七十二年八月一日修正公布之農業發展條例第三十一條前段規定，家庭農場之農業用地，其由能自耕之繼承人繼承或承受，而繼續經營農業生產者，免徵遺產稅或贈與稅。七十三年九月七日修正發布之同條例施行細則第二十一條後段關於「家庭農場之農業用地，不包括於繼承或贈與時已依法編定為非農業使用者在內」之規定，以及財政部七十三年十一月八日臺財稅第六二七一七號函關於「被繼承人死亡或贈與事實發生於修正農業發展條例施行細則發布施行之後者，應依該細則第二十一條規定，即凡已依法編定為非農業使用者，即不得適用農業發展條例第三十一條及遺產及贈與稅法第十七條、第二十條規定免徵遺產稅及贈與稅」之函釋，使依法編為非農業使用之土地，於其所定之使用期限前，仍繼續為從來之農業使用者，不能適用七十五

amended Enforcement Rules of the Agricultural Development Act were promulgated and became effective, Article 21 of said Enforcement Rules shall be followed. That is, no estate tax or gift tax may be exempted under Article 31 of the Agricultural Development Act or Articles 17 and 20 of the Estate and Gift Tax Act for land that was legally classified for non-agricultural use." To the extent that the provision of said Enforcement Rules and the directive, having rendered Article 31 of the Agricultural Development Act as amended on January 6, 1986, with respect to the exemption of the estate tax or gift tax inapplicable to land legally classified for non-agricultural use but continuously used for its original agricultural purpose before the time fixed for its non-agricultural use began, have added restrictions that are not prescribed by law and are thus in conflict with the principle of taxation by law embodied in Article 19 of the Constitution and are furthermore contrary to the constitutional intention of protecting the property right of the people and the principle of reservation of law *(Gesetzesvorbehalt)*. Thus, they must be held to be no longer

年一月六日修正公布之農業發展條例第三十一條免徵遺產稅或贈與稅之規定及函釋，均係增加法律所無之限制，違反憲法第十九條租稅法律主義，亦與憲法保障人民財產權之意旨暨法律保留原則有違，應不再適用。

valid.

REASONING: It must be pointed out at the outset that, as the facts giving rise to the case before us occurred during 1993 and 1996, the law then in force must be applied. When the Agricultural Development Act was amended on August 1, 1983, the Enforcement Rules of the Act were accordingly amended on September 7, 1984. But when Article 2 of said Act was amended on January 6, 1986, no revision was made to the Enforcement Rules hereof. Thus, the law applicable to this case is limited to the law effective during such period. The further amendments to said Act on January 26, 2000, and to the Enforcement Rules thereof on June 7 of the same year are not applicable to the facts in this case, and were not taken into consideration by us in delivering this interpretation.

解釋理由書：本件解釋所由生之具體事件係發生於八十二年及八十五年間，自應適用當時有效之法令。查農業發展條例於七十二年八月一日修正公布，同條例施行細則亦於七十三年九月七日修正發布，嗣同條例於七十五年一月六日雖修正公布第二條，惟同條例施行細則並未修正。從而本解釋之適用法令，自應以此為範圍，至八十九年一月二十六日同條例之再修正及同年六月七日同條例施行細則之再修正，均非本件具體事件所適用之法令，不在本解釋之範圍，合先敘明。

Article 19 of the Constitution provides that the people shall have the duty to pay tax in accordance with law. This means that the people have the duty to pay tax and the privilege to enjoy tax benefit

憲法第十九條規定，人民有依法律納稅之義務，係指人民有依法律所定之納稅主體、稅目、稅率、納稅方法及稅捐減免等項目，負繳納稅捐之義務或享受減免稅捐之優惠，主管機關基於法

pursuant to the taxpaying bodies, tax denominations, tax rates, methods of tax payment, and tax reduction and exemption as they are prescribed by law. The competent authority, in establishing enforcement rules based on the general authorization granted by law, is empowered only to regulate matters relating to the enforcement of the duty to pay tax and the elements required by the enabling statute, with no additions thereto or reductions therefrom, or such rules will be in conflict with the doctrine of taxation per legislation. Furthermore, under Article 23 of the Constitution, any restraint to be imposed on the freedoms and rights of the people must be prescribed by law and may not go beyond the degree of necessity. Where an administrative agency is authorized by the Legislature to issue rules and ordinances as supplements to law, such administrative agency may establish rules in respect of detail and technical matters in relation to the enforcement of the law to the extent that such rules are consistent with the legislative purposes and do not go beyond the scope of power granted by the enabling statute and that the contents of such

律概括授權而訂定之施行細則，僅得就實施母法所定納稅義務及其要件有關之事項予以規範，不得另為增減，否則即屬違反租稅法律主義；又有關人民自由權利之限制，應以法律定之，且不得逾越必要之程度，憲法第二十三條定有明文，如立法機關授權行政機關發布命令為補充規定者，行政機關於符合立法意旨且未逾越母法規定之限度內，亦得就執行法律有關之細節性、技術性事項以施行細則定之，惟其內容不得牴觸母法或對人民之自由權利增加法律所無之限制，迭經本院釋字第三一三號、第三六七號、第三八五號、第四一三號、第四一五號、第四五八號等解釋闡釋甚明。是租稅法律主義之目的，亦在於防止行政機關恣意以行政命令逾越母法之規定，變更納稅義務，致侵害人民權益。

rules do not conflict with the enabling statute or add any restriction that is not prescribed by law on the freedoms and rights of the people. This has been made clear repeatedly in our Interpretations Nos. 313, 367, 385, 413, 415 and 458. Hence, the purpose of the principle of taxation by law is to prevent the administrative authorities from making arbitrary changes to the duty to pay tax by way of administrative ordinances to the extent of going beyond the prescription set forth by the enabling law, thereby resulting in infringement of the right of the people.

The Agricultural Development Act as amended on August 1, 1983, provides in Article 31, the first sentence: "A successor capable of self-tilling who inherits or accepts agricultural land being used as a family farm and continues to engage in agricultural production is exempt from estate tax or gift tax, as the case may be." Under the Enforcement Rules of the Agricultural Development Act as amended on September 7, 1984, no exemption from estate tax is allowed where succession to agricultural land occurs after the land was

七十二年八月一日修正公布之農業發展條例第三十一條前段規定：「家庭農場之農業用地，其由能自耕之繼承人一人繼承或承受，而繼續經營農業生產者，免徵遺產稅或贈與稅」。農業用地經主管機關編定為非農業使用後，發生繼承之事實，依七十三年九月七日修正公布之農業發展條例施行細則之規定，不能免徵遺產稅，惟依財政部八十三年十一月二十九日臺財稅字第八三〇六二五六八二號函則可按一定條件免稅，此一免稅規定於八十九年六月七日修正上開施行細則時正式予以納入。就

classified by the competent authority for non-agricultural use. However, by the Ministry of Finance directive Tai-Tsai-Shui No. 830625682 of November 29, 1994, a tax exemption would be allowable on certain conditions, and this provision was incorporated in said Enforcement Rules when they were revised on June 7, 2000. Insofar as the facts giving rise to this petition for interpretation are concerned, the provisions set forth in the Agricultural Development Act with respect to the assessment of and exemption from the estate tax remained unchanged, whereas the tax burden of the taxpayers was changed in substance by the administrative ordinances issued one after the other. This situation can hardly be said to be consistent with the principle of taxation by law. The term "agricultural land" used in Article 31 of said Act is defined by Article 3, Subparagraph 10, to mean "farmhouses, shelters for livestock and poultry, storage facilities, farmyards, repositories, farm roads, irrigation, drainage, and other agricultural land for farming, forestry, cultivation, husbandry, If its continued operation is less than five years, all taxes

引發本件解釋之事實而言，農業發展條例有關徵免遺產稅之規定並未修正，行政機關前後行政命令卻已實質變更納稅人之租稅負擔，此種情形難謂與租稅法律主義相符。上開條例第三十一條所稱「農業用地」，依同條例第三條第十款規定，指「供農作、森林、養殖、畜牧及與農業經營不可分離之農舍、畜禽舍、倉儲設備、曬場、集貨場、農路、灌溉、排水及其他農用之土地」，立法者並未限定該土地須為經依法編定為一定農牧、農業用途或田、旱地目，始為農業用地，惟基於法律適用之整體性，該土地仍須以合法供農用者為限，而不包括非法使用在內。又依土地法第八十三條規定，土地經編為某種使用地之土地，於其所定之使用期限前，仍得繼續為從來之使用。故土地雖經編為非農業使用，除不得供其他用途之使用外，於所定使用期限前，仍非不得繼續為從來之使用，如其繼續經營不滿五年者，仍應追繳應納稅賦不予優惠（參照當時適用之農業發展條例第三十一條但書）。前述農業發展條例關於農業用地之認定，除該條例所作之定義性規定外，雖亦應與土地法等相關法律規定為整體性闡釋，以定其具體適用範圍。惟若逾越此一範圍，任意擴張、縮減法律所定租

payable thereon must be collected retroactively without any tax incentive. (See Agricultural Development Act, Article 31, proviso, then prevailing) To determine the scope of practical application of "agricultural land" defined by the Agricultural Development Act as aforesaid, the provisions of relevant laws such as the Land Act must be taken into consideration for the purpose of construction as a whole, in addition to the defining prescription set forth in said Act. If, however, such defined limit is overstepped to the extent that the elements required by law with respect to the duty to pay tax or to the privilege of tax reduction or exemption are arbitrarily expanded or abridged, it will be impermissible on the principle of taxation by law embodied in Article 19 of the Constitution. Even if the Ministry of Finance may consider that Article 31 of said Act, with respect to the elements for and the scope of tax exemption, is overly liberal to the extent of jeopardizing the financial and tax policies of the government, or being inconsistent with the purpose of encouraging the development of agriculture, and that modification is there-

稅義務或減免之要件，即非憲法第十九條規定之租稅法律主義所許，縱財政部認該條例第三十一條關於免稅要件及範圍規定過寬，影響財稅政策或有不合獎勵農業發展之原意，有修正必要，亦應循母法修正為之，殊不得任意以施行細則或解釋性之行政規則逕加限縮其適用範圍。七十三年九月七日修正發布之農業發展條例施行細則第二十一條後段關於「家庭農場之農業用地，不包括於繼承或贈與時已依法編定為非農業使用者在內」之規定，以及財政部七十三年十一月八日臺財稅第六二七一七號函關於「被繼承人死亡或贈與事實發生於修正農業發展條例施行細則發布施行之後者，應依該細則第二十一條規定，即凡已依法編定為非農業使用者，即不得適用農業發展條例第三十一條及遺產及贈與稅法第十七條、第二十條規定免徵遺產稅及贈與稅」之函釋，對於向來作為家庭農場之農業用地，因繼承開始前或贈與事實發生前依法編為非農業使用之土地，而於繼承人死亡或贈與事實發生後，於其所定使用期限前，仍可繼續為從來之農業使用者，亦不適用當時之農業發展條例第三十一條免徵遺產稅或贈與稅之規定及函釋部分，即令符合獎勵農業發展之目的，惟其逕以命令訂定，

fore necessary, it must be amended in pursuance of the authorization of the enabling statute, and its application may not be either limited or curtailed directly through the issue of enforcement rules or interpretative administrative regulations. The Enforcement Rules of said Act, as amended on September 7, 1984, provide in Article 21, the second sentence: "Agricultural land used as a family farm does not include land that was legally classified for non-agricultural use before it was inherited or given as a gift." And the Ministry of Finance directive Tai-Tsai-Shui No. 62717 dated November 8, 1984, further defines that "Where the decedent died or the fact of giving the land as a gift occurred after the amended Enforcement Rules of the Agricultural Development Act were promulgated and became effective, Article 21 of said Enforcement Rules shall be followed. That is, no estate tax or gift tax may be exempted under Article 31 of the Agricultural Development Act or Articles 17 and 20 of the Estate and Gift Act for land that was legally classified for non-agricultural use." To the extent that the provision of such enforcement rules

限縮當時有效之同條例第三條第十款「農業用地」定義可適用之範圍，均為增加法律所無之限制，違反憲法第十九條租稅法律主義，亦與憲法保障人民財產權之意旨暨法律保留原則有違，應不再適用（參照本院釋字第二一〇號解釋意旨）。至同條例第三條第十一款關於「耕地」之定義，係基於政策考量，僅在解釋同條例條文中有「耕地」之文字者，例如第三十條（現改為第十六條）關於耕地分割及移轉禁止之情形（現行條例另增第二十條、第二十一條、第二十二條關於耕地租賃之特別規定），自不能據該款解釋，限縮同條第十款「農業用地」之意義範圍，併此說明。

and the directive, by rendering Article 31 of the Agricultural Industry Development Act then in force with respect to exemption of the estate tax or gift tax inapplicable to agricultural land that was at all times used as a family farm but was legally classified as land for non-agricultural use before the beginning of succession or before the occurrence of the fact of being given as a gift but is available for continued use for its original agricultural purpose after the death of the heir or after the occurrence of the fact of being given as a gift and before the time fixed for its non-agricultural use begins, have limited and curtailed the scope of application of "agricultural land" as defined by Article 3, Subparagraph 10, of said Act then in force through the direct issue of administrative ordinance, with the result of adding restrictions that are not prescribed by law, albeit they may be consistent with the purpose of agricultural development. Such restrictions are thus in conflict with the principle of taxation by law embodied in Article 19 of the Constitution and are furthermore contrary to the constitutional intention of protecting the

property right of the people and the principle of reservation of law (Gesetzesvorbehalt). They must be held to be no longer valid (See J. Y. Interpretation No. 210). As regards the term "arable land" defined by Article 3, Subparagraph 11, of said Act, it is designed for policy consideration for the sole purpose of explaining the term "arable land" contained in the text of said Act, e.g., Article 30 (now Article 16) with respect to circumstances where division and transfer of arable land are prohibited (with the addition of Articles 20, 21 and 22 in the current version with special provisions in respect of lease of arable land), and such explanation should certainly not be taken as a ground on which the scope of the meaning of "agricultural land" in Subparagraph 10 of the same article may either be limited or abridged.

Justice Hua-Sun Tseng filed dissenting opinion, in which Justice Yueh-Chin Hwang joined.

本號解釋曾大法官華松與黃大法官越欽共同提出不同意見書。

J. Y. Interpretation No.567（October 24, 2003）*

ISSUE: Is Article 2 of the Regulation Governing the Discipline of Communist Espionage for Purpose of Preventing Recidivists, which abridges the physical freedom of people by means of administrative ordinances, unconstitutional? Moreover, is the provision of Article 6-I (iv) of the Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law in respect of the claims for state compensation, in violation of the Constitution?

RELEVANT LAWS:

Articles 8, 11 and 23 of the Constitution（憲法第八條、第十一條、第二十三條）; Article 7, Paragraph 1, Subparagraph 2, and Paragraph 3 of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第七條第一項第二款、第三項）; Article 6-I (iv) of the Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law（戒嚴時期人民受損權利回復條例第六條第一項第四款）; Article 2 of the Regulation Governing the Discipline of Communist Espionage for Purpose of Preventing Recidivists during the Period of National Mobilization for the Suppression of the Communist Rebellion（戡亂時期預防匪諜再犯管教辦法第二條）; Article 1 of the Act of Compensation for Wrongful Detentions and Executions（冤獄賠償法第一條）.

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* Translated by Professor Andy Y. Sun.

** Contents within frame, not part of the original text, are added for reference purpose only.

KEYWORDS:

reeducation and disciplinary action（感化教育、感訓處分）, personal freedom（人身自由）, national tort claims（國家賠償）.**

HOLDING: Article 8 of the Constitution expressly provides that personal freedom shall be guaranteed to the people. Except in case of flagrante delicto as provided by law, no person shall be arrested or detained other than by a judicial or a police body in accordance with the procedure prescribed by law. During the Martial Law period and within the jurisdiction of Martial Law governance, the chief commander could, under necessary circumstances, restrict personal liberty to a certain degree by the issuance of decrees. However, related punishment still had to be regulated by law, and it carried no [legal] effect unless its content was considered adequately warranted, and the penalty was rendered through trial proceedings. Article 2 of the Regulation Governing the Discipline of Communist Espionage for Purpose of Preventing Re-

解釋文：人民身體之自由應予保障，非由法院依法定程序，不得審問、處罰，憲法第八條設有明文。戒嚴時期在戒嚴地域內，最高司令官固得於必要範圍內以命令限制人民部分之自由，惟關於限制人身自由之處罰，仍應以法律規定，且其內容須實質正當，並經審判程序，始得為之。戡亂時期預防匪諜再犯管教辦法第二條規定：「匪諜罪犯判處徒刑或受感化教育，已執行期滿，而其思想行狀未改善，認有再犯之虞者，得令入勞動教育場所，強制工作嚴加管訓（第一項）。前項罪犯由執行機關報請該省最高治安機關核定之（第二項）。」未以法律規定必要之審判程序，而係依行政命令限制人民身體之自由，不論其名義係強制工作或管訓處分，均為嚴重侵害人身自由之處罰。況該條規定使國家機關僅依思想行狀考核，認有再犯之虞，即得對已服刑期滿之人民再行交付未定期限之管訓，縱國

cidivists during the Period of National Mobilization for the Suppression of the Communist Rebellion provided, "For convicted communist espionage felons having completed a term of imprisonment or reeducation training but likely to recommit the offense(s) due to lack of improvement in beliefs or behaviors, they may be transferred into a labor and education facility for compulsory work and stricter discipline (Paragraph 1). The executing agency shall report to the highest provincial security agency for approval of the [list of] felons designated [for this discipline] (Paragraph 2)." Regardless of whether it is called compulsory work or disciplinary action, both penalties are designed to seriously restrict personal freedoms through administrative orders without authorization by law and necessary trial proceeding. Furthermore, this provision allows a state agency to recommit those who have already completed their penalty terms for an indefinite period of disciplinary actions simply based on a review of their [ideological] beliefs or behaviors and the determination that they are likely to engage in the same criminal

家處於非常時期，出於法律之規定，亦不符合最低限度之人權保障，與憲法第八條及第二十三條之規定有所牴觸，應不予適用。

act. Even though it was enacted during an extraordinary time, this provision does not conform to the minimum standards of human rights protection, and is contradictory to Articles 8 and 23 of the Constitution.

Article 6, Paragraph 1, Section 4, of the Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law stipulates that citizens, having completed their reeducation or disciplinary sentences for the conviction of treason, espionage, or crimes under the Betrayers Punishment Act or Act for the Eradication of Communist Espionage but not released in accordance with the law, may petition the district court having [proper] jurisdiction for national tort claims, and the relevant provisions of the Act of Compensation for Wrongful Detentions and Executions are applicable, mutatis mutandis, in this regard. They are in reference to situations where the term of reeducation or disciplinary actions was arbitrarily extended even after the term was already completed, or other penalties restricting the personal freedom were im-

戒嚴時期人民受損權利回復條例第六條第一項第四款規定，人民於戒嚴時期因犯內亂、外患、懲治叛亂條例或檢肅匪諜條例之罪，於有罪判決或交付感化教育、感訓處分，執行完畢後，未依法釋放者，得聲請所屬地方法院準用冤獄賠償法相關規定，請求國家賠償，係指於有罪判決或感化教育、感訓處分裁判執行完畢後，任意繼續延長執行，或其他非依法裁判所為限制人身自由之處罰，未予釋放，得請求國家賠償之情形而言，從而上開規定與憲法平等保障人民權利之意旨，尚無不符。

posed without due process under which the cause of national tort claims is available. Therefore, these provisions do not contradict the purpose of the Constitution in terms of safeguarding the rights of the people.

REASONING: Article 8, Paragraph 1, of the Constitution states that, "Personal freedom shall be guaranteed to the people. Except in case of flagrante delicto as provided by law, no person shall be arrested or detained otherwise than by a judicial or a police organ in accordance with the procedure prescribed by law. No person shall be tried or punished otherwise than by a law court in accordance with the procedure prescribed by law. Any arrest, detention, trial, or punishment which is not in accordance with the procedure prescribed by law may be resisted." It means any punishment concerning the restraint of personal freedom must be regulated by law and may not be executed unless and until a proper trial is conducted. The legislature must further ensure that when enacting a law or statute, its content must be substantively adequate

解釋理由書：憲法第八條第一項規定：「人民身體之自由應予保障。除現行犯之逮捕由法律另定外，非經司法或警察機關依法定程序，不得逮捕拘禁。非由法院依法定程序，不得審問處罰。非依法定程序之逮捕、拘禁、審問、處罰，得拒絕之。」揆其意旨，係指關於限制人身自由之處罰，應以法律規定，並經審判程序，始得為之。立法機關於制定法律時，其內容更須合於實質正當，縱為防止妨礙他人自由、避免緊急危難、維持社會秩序、或增進公共利益之必要，仍不得逾越必要之限度，復為憲法第二十三條所明定。我國於動員戡亂時期與戒嚴時期，係處於非常時期之國家體制，國家權力與人民權利之保障固與平時不可同日而語。但人民身體自由享有充分保障，乃行使其憲法上所保障其他權利之前提，為重要之基本人權，縱於非常時期，對人民身體自由之處罰仍須合於憲法第八條及第二十三

so that it does not exceed the necessary limitations, even if it is to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order or to advance public welfare, as expressly stipulated by Article 23 of the Constitution. During the Period of National Mobilization for the Suppression of the Communist Rebellion, the nation was under a system that was extraordinary in nature, and the nation's power and the protection of citizens' rights were certainly not comparable to what they should have been under normal circumstances. Yet the premises for the protection of all other constitutional rights rest on the full protection of bodily freedom, which is a fundamental human right. Thus, even under extraordinary circumstances, the punishment restricting an individual's bodily freedom must nevertheless be in conformity to Articles 8 and 23 of the Constitution.

條之規定。

Article 2 of the Regulation Governing the Discipline of Communist Espionage for Purpose of Preventing Recidivists during the Period of National Mobi-

戡亂時期預防匪諜再犯管教辦法第二條規定：「匪諜罪犯判處徒刑或受感化教育，已執行期滿，而其思想行狀未改善，認有再犯之虞者，得令入勞動

lization for the Suppression of the Communist Rebellion provided, “For convicted communist espionage felons having completed a term of imprisonment or reeducation training but likely to recommit the offense(s) due to lack of improvement in beliefs or behaviors, they may be transferred into a labor and education facility for compulsory work and stricter discipline (Paragraph 1). The executing agency shall report to the highest provincial security agency for approval of the [list of] felons designated [for this discipline] (Paragraph 2).” Based on this regulation, those convicted of the crime of communist espionage, who had fulfilled the term of imprisonment or reeducation training but were still physically confined in a certain location without being released, regardless of whether such detainment was called compulsory work or disciplinary action, in fact were not treated differently from those who were punished by being deprived of personal freedom. By nature they are punishments which seriously encroach on the personal bodily freedom of people and can be rendered only by courts through [proper] le-

教育場所，強制工作嚴加管訓（第一項）。前項罪犯由執行機關報請該省最高治安機關核定之（第二項）。」依此規定，對匪諜罪犯受徒刑或感化教育已執行期滿者，不予釋放而逕行拘束其身體自由於一定處所，不論其名義係強制工作或管訓處分，實與剝奪人民行動自由之刑罰無異，性質上均為嚴重侵害人民身體自由之處罰，依憲法第八條之規定，應由法院依法定程序始得為之。前開管教辦法規定由法院以外之機關，即該省最高治安機關依行政命令核定其要件並予執行，與憲法第八條之規定顯有牴觸。又限制人民身體之自由，應由立法機關制定法律加以規範，且其內容須實質正當。前開辦法僅係行政機關自行訂定之命令，即得對已服刑期滿之人民再行交付未定期限之管訓，不符合憲法第八條及第二十三條規定之意旨，應不予適用。

gal proceedings, in accordance with Article 8 of the Constitution. The abovementioned disciplinary measures permitted an agency other than the court, that is, the highest police authority of the province, to promulgate and execute the conditions by executive orders, which clearly violated Article 8 of the Constitution. Any restriction of personal freedom must be stipulated by statutes and be enacted by the legislature, provided that the content is substantively adequate. The measures in question were merely executive orders promulgated by an executive agency that [permitted] the exercise of disciplinary actions without any term restriction, which were not enforceable as they were not in conformity with Articles 8 and 23 of the Constitution.

While the state may impose more restrictions on individual rights during extraordinary periods and due to necessity under extraordinary circumstances, such restrictions must nevertheless not exceed the boundaries of minimum human rights protection. Freedom of thought must be upheld to safeguard the spiritual activities

非常時期，國家固得為因應非常事態之需要，而對人民權利作較嚴格之限制，惟限制內容仍不得侵犯最低限度之人權保障。思想自由保障人民內在精神活動，是人類文明之根源與言論自由之基礎，亦為憲法所欲保障最基本之人性尊嚴，對自由民主憲政秩序之存續，具特殊重要意義，不容國家機關以包括

of the people, the root of human civilization and the foundation of freedom of expression, and the most fundamental human dignity the Constitution intends to protect. Given its particularly crucial meaning to the continuance of the constitutional order of freedom and democracy, no government agencies may encroach upon [this fundamental right] in the name of emergencies. Even in times of extraordinary nature, and regardless of whether in the form of a statute, invasion of the scope of minimum human rights is prohibited, be it with the means to compel revelation or rehabilitation. It should also be pointed out that Article 2 of the Regulation Governing the Discipline of Communist Espionage for Purpose of Preventing Recidivists during the Period of National Mobilization for the Suppression of the Communist Rebellion, which permitted the state agencies to order those who were likely to recommit the offense(s) due to lack of improvement in beliefs or behaviors into a labor and education facility for compulsory work and stricter discipline, is no different from allowing a state agency to try to reform the beliefs of its

緊急事態之因應在內之任何理由侵犯之，亦不容國家機關以任何方式予以侵害。縱國家處於非常時期，出於法律規定，亦無論其侵犯手段是強制表態，乃至改造，皆所不許，是為不容侵犯之最低限度人權保障。戡亂時期預防匪諜再犯管教辦法第二條規定國家機關得以人民思想行狀未改善，認有再犯之虞為理由，令入勞動教育場所強制工作嚴加管訓，無異於允許國家機關得以強制方式改造人民之思想，違背憲法保障人民言論自由之本旨，亦不符合最低限度之人權保障，併予指明。

citizens through compulsory means, and violates not only the basic purpose of the Constitution for the protection of freedom of expression but also the minimum scope of human rights protection.

Article 6, Paragraph 1, Section 4, of the Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law stipulates that citizens, having completed their reeducation or disciplinary sentences for the conviction of treason, espionage, or crimes under the Betrayers Punishment Act or Act for the Eradication of Communist Espionage but not having been released in accordance with the law, may petition the district court having [proper] jurisdiction for national tort claims, and the relevant provisions of the Act of Compensation for Wrongful Detentions and Executions are applicable, mutatis mutandis, in this regard. They are in reference to situations where the term of reeducation or disciplinary actions was arbitrarily extended even after the term was already completed, or other prolonged penalties restricting personal freedom were imposed without due

戒嚴時期人民受損權利回復條例第六條第一項第四款規定，人民於戒嚴時期因犯內亂、外患、懲治叛亂條例或檢肅匪諜條例之罪，於有罪判決或交付感化教育、感訓處分，執行完畢後，未依法釋放者，得聲請所屬地方法院準用冤獄賠償法相關規定，請求國家賠償，係指於有罪判決或感化教育、感訓處分裁判執行完畢後，任意繼續延長執行，或其他非依法裁判所為限制人身自由之處罰，未予釋放，得請求國家賠償之情形而言，從而上開規定與憲法平等保障人民權利之意旨，尚無不符。

process under which the cause of national tort claims is available. Therefore, these provisions do not contradict the purpose of the Constitution in terms of safeguarding the rights of the people.

[translation of miscellaneous matters omitted.]

聲請人認司法院冤獄賠償覆議委員會九十年度台覆字第二六四號及九十一年度台覆字第八五號決定與台灣板橋地方法院八十八年度賠字第六一號、台灣士林地方法院八十九年度賠字第五六號及台灣台中地方法院八十九年度賠字第六五號等決定適用同一法令所表示之見解有異而聲請統一解釋部分，經查係屬相同審判機關間裁判所生之歧異，並非不同審判機關間之確定終局裁判適用同一法律或命令所表示之見解有異，核與司法院大法官審理案件法第七條第一項第二款之要件不符，依同條第三項規定，應不受理，附此敘明。

J. Y. Interpretation No.568（November 14, 2003）*

ISSUE: Does Article 18 of the Enforcement Rules of the Employment Insurance Act, whereby the insurer is entitled to cancel the insurance in case the insured entity fails to pay the premium and default penalty or is incapable of payment, go beyond the power granted by the Labor Insurance Act and is it thus unconstitutional?

RELEVANT LAWS:

Articles 23, 153 and 155 of the Constitution（憲法第二十三條、第一百五十三條、第一百五十五條）; Article 10, Paragraph 8 of the Amendment to the Constitution（憲法增修條文第十條第八項）; Article 5, Paragraph 1, Subparagraphs 1 and 2 of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第五條第一項第一款、第二款）; Articles 17, Paragraphs 1, 2 , 3, and 19, Paragraph 1 of the Employment Insurance Act（勞工保險條例第十七條第一項、第二項、第三項、第十九條第一項）; Article 18 of the Enforcement Rules of the Employment Insurance Act（勞工保險條例施行細則第十八條）; Supreme Administrative Court in its judgment Pan-Tze No. 156 (2002)（最高行政法院九十一年判字第一五六號判決）.

KEYWORDS:

public law rights（公法上權利）, insurance payment（保險

* Translated by Raymond T. Chu.
** Contents within frame, not part of the original text, are added for reference purpose only.

給付）, insurance relations（保險關係）, legislative intention（立法意旨）, insurer（保險人）, insured person（被保險人）, insured entity（保險單位）, insurance premium（保險費）, social insurance program（社會保險制度）, social security（社會安全）, default penalty（滯納金）, cancel the insurance（退保）, room for discretion（自由形成之空間）.**

HOLDING: The right of a worker to enroll in the labor insurance program and all of his public law rights arising therefrom are guaranteed by the Constitution. All matters in connection with the commencement, suspension, and termination of the effect of the insurance and the performance of the insurance payment are matters relating to the rights and obligations of workers arising out of the insurance relations and are of great concern to the interest of workers. Thus, any restriction on the workers' right must be prescribed by law, and the legislative purpose and approach must be consistent with Article 23 of the Constitution. If the administrative authorities are empowered by law to issue rules and ordinances as

解釋文：勞工依法參加勞工保險及因此所生之公法上權利，應受憲法保障。關於保險效力之開始、停止、終止及保險給付之履行等事由，係屬勞工因保險關係所生之權利義務事項，攸關勞工權益至鉅，其權利之限制，應以法律定之，且其立法目的與手段，亦須符合憲法第二十三條之規定。若法律授權行政機關發布命令為補充規定者，該命令須符合立法意旨且未逾越母法授權之範圍，始為憲法所許。勞工保險條例施行細則第十八條關於投保單位有歇業、解散、破產宣告情事或積欠保險費及滯納金經依法強制執行無效果者，保險人得以書面通知退保；投保單位積欠保險費及滯納金，經通知限期清償，逾期仍未清償，有事實足認顯無清償可能者，保險人得逕予退保之規定，增加勞工保

supplements thereto, such rules and ordinances must be consistent with the legislative intention and must not go beyond the scope of power granted by the enabling statute to be permissible under the Constitution. The provision of Article 18 of the Enforcement Rules of the Employment Insurance Act stating that the insurer may by a written notice cancel the insurance in the case where the insured entity closes down its business or is dissolved or goes bankrupt or fails to pay the insurance premium and, default penalty due and payable notwithstanding, the compulsory execution proceeding taken against such entity and that the insurer may immediately cancel the insurance in case the insured entity fails to pay the insurance premium and default penalty overdue after lapse of the time limit given by the insurer in a notice and there are sufficient facts to show that there is no possibility for the insured entity to make payment, adds extra reasons for the termination of the insurance that do not exist in the Labor Insurance Act, has gone beyond the power granted by the Act with respect to the scope of the enforcement rules, and is

險條例所未規定保險效力終止之事由，逾越該條例授權訂定施行細則之範圍，與憲法第二十三條規定之意旨未符，應不予適用。

thus contrary to the intention embodied in Article 23 of the Constitution. Said provision must cease to be operative.

REASONING: In this case regarding labor insurance, where the Petitioner demands interpretation with respect to the question of whether Article 18 of the Enforcement Rules of the Employment Insurance Act applied by the Supreme Administrative Court in its judgment Pan-Tze No. 156 delivered in 2002 is in conflict with the Constitution, we must point out at the outset that, while the Petitioner fails to state that this petition is based on the Constitutional Interpretation Procedure Act, Article 5, Paragraph 1, Subparagraph 2, which allows a person to petition for constitutional interpretation in case his constitutional right was illegally infringed upon and he has brought a lawsuit for such infringement in pursuance of legal procedures, but has raised doubts as to the constitutionality of the statute or regulation relied upon by the court in its final and irrevocable judgment, and the Petitioner has by mistake invoked Subparagraph 1 of said Article as the ground

解釋理由書：按本件聲請人因勞保事件，認最高行政法院九十一年度判字第一五六號判決所適用之勞工保險條例施行細則第十八條規定有牴觸憲法之疑義而聲請解釋，雖未載明係以司法院大法官審理案件法第五條第一項第二款就人民於其憲法上所保障之權利，遭受不法侵害，經依法定程序提起訴訟，對於確定終局裁判所適用之法律或命令發生有牴觸憲法疑義者，得聲請解釋憲法之規定為據，而誤引同條項第一款作為聲請之依據，惟其聲請書既已具體指摘前開確定終局判決所適用之勞工保險條例施行細則第十八條規定牴觸母法，增加法律所無之限制，應宣告無效等語，應認符合前開審理案件法第五條第一項第二款規定之要件，爰予受理，合先敘明。勞工保險係國家為實現憲法第一百五十三條保護勞工生活及憲法第一百五十五條、憲法增修條文第十條第八項實施社會保險制度之基本國策而建立之社會安全措施，為社會保險之一種。勞工保險條例即係依上開憲法意旨而制定之法律。勞工依該條例參加勞工保險

for his petition, the Petitioner has asserted specifically, inter alia, that Article 18 of the Enforcement Rules of the Employment Insurance Act applied by the aforesaid irrevocable and final judgment is against the enabling statute by adding extra restrictions not prescribed by law and must be declared null and void. We think the Petitioner's statements meet the elements required by the Constitutional Interpretation Procedure Act, Article 5, Paragraph 1, Subparagraph 2, and we have hence decided to take up this case. Employment insurance is a type of social insurance as a part of the social security program established for the realization of the fundamental national policies laid down by Article 153 of the Constitution with respect to the protection of the livelihood of workers and Article 155 of the Constitution and Article 10, Paragraph 8, of the Amendments to the Constitution with respect to the establishment of a social insurance program. The Employment Insurance Act is a legislation enacted in pursuance of the purposes of the Constitution outlined above. The right of a worker to enroll in the labor insurance program

及因此所生之公法上權利，應受憲法保障。關於保險效力之開始、停止、終止及保險給付之履行等事由，係屬勞工因保險關係所生之權利義務事項，攸關勞工權益至鉅，其權利之限制，應以法律定之，且其立法目的與手段，亦須符合憲法第二十三條之規定。若法律授權行政機關發布命令為補充規定者，該命令須符合立法意旨且未逾越母法授權之範圍，始為憲法所許。

and all of his public law rights arising therefrom are guaranteed by the Constitution. All matters in connection with the commencement, suspension, and termination of the effect of the insurance and the performance of insurance payment are matters relating to the rights and obligations of workers arising out of the insurance relations and are of great concern to the interest of workers. Thus, any restriction on the workers' right must be prescribed by law, and the legislative purpose and approach must be consistent with Article 23 of the Constitution. If the administrative authorities are empowered by law to issue rules and ordinances as supplements thereto, such rules and ordinances must be consistent with the legislative intention and must not go beyond the scope of power granted by the enabling statute to be permissible under the Constitution.

Where an insured event occurs to a worker who has enrolled in the labor insurance program as an insured during the term of the insurance, the insured or his beneficiary may legally claim insurance

勞工參加勞工保險為被保險人，於保險有效期間內發生保險事故者，被保險人或其受益人得依法向保險人請領保險給付（勞工保險條例第十九條第一項規定參照）。勞工保險條例對於投保

payment from the insurer. (See the Employment Insurance Act, Article 19, Paragraph 1). In the event of failure of an insured entity to pay the insurance premium when due and payable, the Employment Insurance Act provides that the insurer shall charge a default penalty upon lapse of the statutory grace period and shall take legal action if the insured entity continues to fail to make payment upon the lapse of the period of fifteen (15) days after the default penalty is charged, and that from the date such legal action is taken the insurer is entitled to temporarily suspend payment of insurance benefit until the insurance premium and the default penalty due are fully paid. (See the Act, Article 17, Paragraphs 1, 2 and 3). The Act has no provision to allow the insurer to cancel the insurance for the insured in the above circumstances. However, the Enforcement Rules of the Act provide in Article 18: "The insurer may by a written notice cancel the insurance in case the insured entity closes down its business or is dissolved or goes bankrupt or fails to pay the insurance premium and default penalty due and payable notwithstanding

單位逾期繳納保險費者，規定保險人於法定寬限期間經過後，應加徵滯納金，若於加徵滯納金十五日後仍未繳納者，應依法訴追，並自訴追之日起，在保險費及滯納金未繳清前，發生暫行拒絕給付之效力（同條例第十七條第一、二、三項規定參照），並未規定保險人得以上開事由逕行將被保險人退保；同條例施行細則第十八條卻規定：「投保單位有歇業、解散、破產宣告情事或積欠保險費及滯納金經依法強制執行無效果者，保險人得以書面通知退保。保險效力之停止，應繳保險費及應加徵滯納金之計算，以上述事實確定日為準，未能確定者，以保險人查定之日為準（第一項）。投保單位積欠保險費及滯納金，經通知限期清償，逾期仍未清償，有事實足認顯無清償可能者，保險人得逕予退保，其保險效力之停止，應繳保險費及應加徵滯納金之計算，以通知限期清償屆滿之日為準（第二項）。」顯已增加勞工保險條例所未規定之保險效力終止事由，逾越該條例授權訂定施行細則之範圍，與憲法第二十三條規定之意旨未符，應不予適用。又為確保保險財務之健全，與勞工保險之永續經營，國家就社會保險制度縱有較大之自由形成空間，於投保單位積欠應繳之保險費及滯

the compulsory execution proceeding taken against such entity. The term of the insurance shall be suspended and the insurance premium payable and the default payment chargeable shall be computed as of the date the facts specified above are ascertained as the base date therefor. If such date cannot be ascertained, the date determined by the insurer upon investigation shall be the base date (Paragraph 1). The insurer may immediately cancel the insurance in the case where the insured entity fails to pay the insurance premium and default penalty overdue after lapse of the time limit given by the insurer in a notice and where there are sufficient facts to show that there is no possibility for the insured entity to make payment, and in such circumstance, the term of the insurance shall be suspended and the insurance premium payable and the default payment chargeable shall be computed as of the date of expiration of the time limit given in a notice demanding payment (Paragraph 2).” The article quoted has obviously added reasons for the termination of the insurance that do not exist in the Employment Insurance Act and has gone be-

納金，強制執行無效果或顯無清償可能時，若許保險人得將被保險人予以退保者，亦宜依比例原則就被保險人是否已繳納保險費或有無其他特別情事，予以斟酌而有不同之處置；上開條例第十七條第三項但書亦明定，被保險人應繳部分之保險費已扣繳或繳納於投保單位者，不因投保單位積欠保險費及滯納金而對其發生暫行拒絕給付之效力，併此指明。

yond the power granted by the Act with respect to the scope of the Enforcement Rules, and is thus contrary to the intention embodied in Article 23 of the Constitution. Said provision must cease to be operative. Furthermore, orbiter dictum, granted that the state should be given more room for discretion in order to insure sound financing for the insurance and the perpetual operation of the labor insurance program, to the extent that the insurer is allowed to cancel the insurance in case the insured entity fails to pay the premium and default penalty owed and payable and compulsory execution has brought no result or it is obvious that full payment has become impossible, it is desirable that different measures be adopted by taking into consideration, on the principle of proportionality, whether the insured has paid the premium or whether there exists any special circumstance. A fortiori, it is also provided by the proviso to Paragraph 3 of Article 17 of the Act that an insured person shall not be temporarily refused payment of insurance benefits because the insured entity fails to pay the premium and default penalty owed

and payable by it if the portion of the premium payable by the insured person has already been deducted by or paid to such insured entity.

Justice Yih-Nan Liaw n filed concurring opinion.

Justice Tzong-Li Hsu filed concurring opinion.

Justice Yu-hsiu Hsu filed concurring opinion.

本號解釋廖大法官義男、許大法官宗力與許大法官玉秀分別提出協同意見書。

J. Y. Interpretation No.569（December 12, 2003）*

ISSUE: While a person may not bring private prosecution against his/her spouse under the Code of Criminal Procedure, is he/she also prohibited from instituting private prosecution against the person who commits the offense of adultery with his/her spouse?

RELEVANT LAWS:

Articles 16, 22 and 23 of the Constitution（憲法第十六條、第二十二條、第二十三條）; J. Y. Interpretations Nos. 242, 507 and 554（司法院釋字第二四二號、第五〇七號、第五五四號解釋）; J. Y. Interpretations Yuan Tze Nos. 364 and 1844, section (3)（司法院院字第三六四號解釋及院字第一八四四號解釋（三）後段）; Article 5, Paragraph 1, Subparagraph 2, and Paragraph 3 of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第五條第一項第二款、第三項）; Articles 239 and 245, Paragraph 1 of the Criminal Code（刑法第二百三十九條、第二百四十五條第一項）; Articles 29, 31, Paragraph 1, 37, Paragraphs 1 and 2, 47, 218, 228, Paragraph 1, 232, 233, Paragraph 1, 234, Paragraph 2, 239, first sentence, 266, 321, 339, 343, 404, 429 of the Code of Criminal Procedure（刑事訴訟法第二十九條、第三十一條第一項、第三十七條第一項、第二項、第四十七

* Translated by Raymond T. Chu.

** Contents within frame, not part of the original text, are added for reference purpose only.

條、第二百十八條、第二百二十八條第一項、第二百三十二條、第二百三十三條第一項、第二百三十四條第二項、第二百三十九條前段、第二百六十六條、第三百二十一條、第三百三十九條、第三百四十三條、第四百零四條、第四百二十九條）; Supreme Court Precedents S. T. 2333 (Sup. Ct., 1940), the first paragraph, and F. T. 15 (Sup. Ct., 1940)（最高法院二十九年上字第二三三三號判例前段、二十九年非字第一五號判例）; Supreme Court criminal judgment T.F.T 147 (Sup. Ct., 1990)（最高法院七十九年台非字第一四七號刑事判決）.

KEYWORDS:

private prosecution（自訴）, criminal complaint（刑事告訴）, spouse（配偶）, scope defined by the Legislature at its discretion（立法機關自由形成之範圍）, joint offenders（共犯）, joint defendants（共同被告）, offense indictable only upon complaint（告訴乃論之罪）, adulterer（姦夫）, adulteress（姦婦）, the person in an adulterous alliance（相姦之人）, adultery（通姦）, lineal ascendant（直系尊親屬）, lineal relatives（直系親屬）, relatives living together and sharing the same property（同財共居親屬）, doctrine of indivisibility of prosecution（告訴不可分原則）, effect in personam（對人之效力）, subjective effect（主觀之效力）, substantive law judgment（實體判決）, expanded interpretation（擴張解釋）, judicial resources（司法資源）, civil proceedings incidental to a criminal action（刑事附帶民事訴訟）, interruption of the period of limitation of criminal prose

cution（刑事追訴權時效中斷）, period of prescription of civil claims（民事請求權時效）, right to carry out a voluntary investigation（主動調查權）.**

HOLDING: The purpose of Article 16 of the Constitution providing that the people shall have the right of action is to guarantee the people the right to seek judicial remedies for unlawful infringement of their right and interest. The exercise of the right of action, however, is subject to prescription of law, and the law may of course impose reasonable restrictions on the practice of the people's right of action within the meaning contemplated by Article 23 of the Constitution. Article 321 of the Code of Criminal Procedure, which disallows the institution of private prosecution against one's spouse, is intended to prevent antagonistic fights between husband and wife in the courtroom because of private prosecution, which thereby jeopardize the marital relations and harmonious family life. It represents a reasonable restriction imposed to maintain the personal and ethical relation-

解釋文：憲法第十六條明定人民有訴訟之權，旨在確保人民權益遭受不法侵害時，有權訴請司法機關予以救濟。惟訴訟權如何行使，應由法律規定；法律於符合憲法第二十三條意旨之範圍內，對於人民訴訟權之實施自得為合理之限制。刑事訴訟法第三百二十一條規定，對於配偶不得提起自訴，係為防止配偶間因自訴而對簿公堂，致影響夫妻和睦及家庭和諧，乃為維護人倫關係所為之合理限制，尚未逾越立法機關自由形成之範圍；且人民依刑事訴訟法相關規定，並非不得對其配偶提出告訴，其憲法所保障之訴訟權並未受到侵害，與憲法第十六條及第二十三條之意旨尚無牴觸。

ship between husband and wife and does not go beyond the scope defined by the Legislature at its discretion. And, as a person is not otherwise prevented by the Code of Criminal Procedure from initiating a criminal complaint against his/her spouse, with the result that his/her right to sue protected by the Constitution is not encroached upon, said article is not in conflict with the purpose of Articles 16 and 23 of the Constitution.

While Article 321 of the Code places a restriction on a person's right to initiate private prosecution against his/her spouse, it does not prevent him/her from initiating legally private prosecution against the one who commits jointly with his/her spouse an offense indictable only upon complaint. The parts of J. Y. Interpretations Yuan Tze Nos. 364 and 1844 stating that a person is not allowed to institute private prosecution against the one who commits jointly with his/her spouse an offense indictable only upon complaint are not necessary for maintaining harmonious family life and ethical relationships and are contrary to the purpose of the Constitution in

刑事訴訟法第三百二十一條規定固限制人民對其配偶之自訴權，惟對於與其配偶共犯告訴乃論罪之人，並非不得依法提起自訴。本院院字第三六四號及院字第一八四四號解釋相關部分，使人民對於與其配偶共犯告訴乃論罪之人亦不得提起自訴，並非為維持家庭和諧及人倫關係所必要，有違憲法保障人民訴訟權之意旨，應予變更；最高法院二十九年上字第二三三三號判例前段及二十九年非字第一五號判例，對人民之自訴權增加法律所無之限制，應不再援用。

protecting the people's right of action, and thus must be altered. The Supreme Court Precedents S. T. 2333 (Sup. Ct., 1940), the first paragraph, and F. T. 15 (Sup. Ct., 1940), which imposed on the right of action of the people restrictions that are not prescribed by law, must no longer be invoked as authorities.

REASONING: In the case before us involving an offense against marriage, the Petitioner demands the interpretation of this Yuan on the grounds that the Supreme Court Precedents S. T. 2333 (Sup. Ct., 1940) and F. T. 15 (Sup. Ct., 1940) cited as authorities in the irrevocable and confirmed judgment at issue here are in conflict with the Constitution. It must be pointed out at the outset that said Precedents, imposing a restriction to the effect that a person may not, on the doctrine of indivisibility of complaint, institute a private prosecution against the one who has committed jointly with his/her spouse an offense indictable only upon complaint, are essentially the same as the relevant parts of our Interpretations Yuan Tze No. 364 and Yuan Tze No. 1844.

解釋理由書：本件聲請人因妨害婚姻案件，認系爭確定終局判決所適用之最高法院二十九年上字第二三三三號及二十九年非字第一五號判例有牴觸憲法之疑義，聲請解釋。按上開判例係以告訴不可分之原則限制人民不得對於與其配偶共犯告訴乃論罪之人提起自訴，其意旨與本院院字第三六四號及院字第一八四四號解釋之有關部分相同。上開解釋雖非本件聲請解釋之標的，惟與系爭判例關聯密切，為貫徹釋憲意旨，應一併納入審查範圍，合先說明。

Thus, while said Interpretations are not the subject matter in this case, they are closely related with the Precedents at issue here and must be included in our review of this case in order to make an exhaustive interpretation of the Constitution.

The purpose of Article 16 of the Constitution providing that the people shall have the right of action is to guarantee the people the right to seek judicial remedies for unlawful infringement of their right and interest. A married person who commits adultery with another person is betraying his/her marriage and jeopardizing the harmonious family life, thereby infringing upon the freedom and right protected by the Constitution, for which Article 239 of the Criminal Code makes the person punishable, and his/her spouse is certainly entitled to seek judicial remedy through the institution of legal action (See J. Y. Interpretations Nos. 507, 242 and 554). The exercise of the right of action, however, is subject to prescription of law, and the law may of course impose reasonable restrictions on the practice of the people's right of action within the

憲法第十六條明定人民有訴訟之權，旨在確保人民憲法上之權利或法律上之利益遭受不法侵害時，有權依法請求救濟。有配偶而與人通姦，悖離婚姻忠誠，破壞家庭和諧，侵害憲法第二十二條所保障之自由權利，刑法第二百三十九條並明文施予處罰，其配偶自得依法訴請司法機關予以救濟（本院釋字第五〇七號、第二四二號與第五五四號解釋參照）。惟訴訟權如何行使，應由法律予以規定；法律於符合憲法第二十三條意旨之範圍內，對於人民訴訟權之實施自得為合理之限制。刑事訴訟法第三百二十一條規定，對於配偶不得提起自訴，係為防止配偶間因自訴而對簿公堂，致影響夫妻和睦及家庭和諧，為維護人倫關係所為之合理限制，尚未逾越立法機關自由形成之範圍；且人民依刑事訴訟法第二百三十二條、第二百三十三條第一項、第二百三十四條第二項等規定，並非不得對其配偶提出告訴，其

meaning contemplated by Article 23 of the Constitution. Article 321 of the Code of Criminal Procedure, which disallows the institution of private prosecution against one's spouse, is designed to prevent antagonistic fights between husband and wife in the courtroom because of private prosecution, which would thereby jeopardize the marital relations and harmonious family life. It represents a reasonable restriction imposed to maintain the personal and ethical relationship between husband and wife and does not go beyond the scope defined by the Legislature at its discretion. And, as a person is not otherwise prohibited under the Code of Criminal Procedure from initiating a criminal complaint against his/her spouse under Article 232; Article 233, Paragraph 1; and Article 234, Paragraph 2 thereof, with the result that his right to sue protected by the Constitution is not encroached upon, said Article is not in conflict with the purpose of Articles 16 and 23 of the Constitution.

憲法所保障之訴訟權並未受到侵害，與憲法第十六條及第二十三條之意旨尚無牴觸。

Under Article 321 of the Code of Criminal Procedure "no person may bring

刑事訴訟法第三百二十一條規定：「對於直系尊親屬或配偶，不得提

a private prosecution against his/her lineal ascendant or spouse." Thus, a person may not initiate private prosecution against his/her spouse who has committed the offense of adultery under Article 239 of the Criminal Code. There is, however, no such restriction on the initiation of private prosecution against the person in an adulterous alliance with his/her spouse. Nevertheless, the Supreme Court Precedent S. T. 2333 (Supreme Court, 1940), the first sentence, stated that: "Under Article 218 of the Code of Criminal Procedure, where a criminal complaint is filed against one of the joint offenders of a crime indictable only upon complaint, the filing of such complaint shall have the same effect as a filing against all other joint offenders. In the circumstance where one of the joint defendants is the spouse of the injured party, since the injured party may not bring a private prosecution against his/her spouse, he/she may not likewise bring a private prosecution against the other defendant on the doctrine of indivisibility of prosecution." The Court also held in its Precedent F. T. 15 (Supreme Court, 1940): "That a person may not initiate

起自訴」；是配偶犯刑法第二百三十九條之通姦罪者，人民固不得對其配偶提起自訴，惟對於與其配偶相姦之人，則並無不得提起自訴之限制。然依最高法院二十九年上字第二三三三號判例前段：「告訴乃論罪依刑事訴訟法第二百十八條規定，對於共犯中之一人告訴，其效力及於其他共犯，故共同被告之一人為被害人之配偶時，被害人既不得對之提起自訴，則依告訴不可分之原則，對於其他被告亦即不得自訴」，及同院二十九年非字第一五號判例：「對於配偶不得提起自訴，刑事訴訟法第三百十三條有明文規定，被告與自訴人之妻某氏相姦，本為觸犯刑法第二百三十九條之罪，依同法第二百四十五條第一項須告訴乃論，自訴人對於其妻某氏既不得提起自訴，依告訴不可分之原則，即對於被告亦不得提起自訴」之意旨，人民對於與其配偶相姦之人或其他與其配偶共犯告訴乃論罪之人亦不得提起自訴。又行憲前制定公布之刑事訴訟法對於不得提起自訴之對象，或為「直系親屬、配偶或同財共居親屬」（中華民國十七年七月二十八日國民政府公布之刑事訴訟法第三百三十九條），或為「直系尊親屬或配偶」（二十四年一月一日修正公布之同法第三百十三條）。然本院院

private prosecution against his/her spouse is clearly prescribed by Article 313 of the Code of Criminal Procedure. While the Accused has committed adultery with the private prosecutor's wife, which act constitutes an offense under Article 239 of the Criminal Code, the offense is indictable only upon complaint. Since the private prosecutor is not allowed to bring a private prosecution against his wife, he may not likewise bring a private prosecution against the Accused on the doctrine of indivisibility of prosecution." Thus, a person may not bring private prosecution against the one who commits adultery with his/her spouse or the one who commits jointly with his/her spouse an offense that is indictable only upon complaint. Furthermore, under the Code of Criminal Procedure enacted and promulgated before the Constitutional Law came into force on January 1, 1947, the persons against whom no private prosecution was allowed included either "lineal relatives, spouse, and relatives living together and sharing the same property" (Code of Criminal Procedure promulgated by the Nationalist Government on July 28, 1928,

字第三六四號解釋：「有夫之婦與人通姦，本夫對於姦婦既屬配偶，應受刑事訴訟法第三百三十九條之限制，不許自訴，僅得向檢察官告訴，依公訴程序辦理。（參照院字第四零號解釋）其對姦夫，依告訴乃論之罪告訴不可分之原則，亦僅得告訴，不適用自訴程序」，及院字第一八四四號解釋(三)後段：「戊自訴其妻己與庚通姦，或共同輕微傷害。戊與己係屬配偶，既受刑訴法第三一三條限制，不得提起自訴，依告訴不可分原則，戊對於庚之自訴，自應併予不受理」，亦均以告訴不可分原則，擴大對人民自訴權之限制。

Article 339) or "lineal ascendants and spouse." (Said Code as amended on January 1, 1935, Article 313). It was also held by this Yuan in Interpretation No. Yuan Tze 364: "Where a married woman commits adultery with another man, the husband, as the spouse of the adulteress, is subject to the restriction prescribed by Article 339 of the Code of Criminal Procedure and shall not be allowed to institute private prosecution against her, but may file with the prosecutor a complaint, seeking public prosecution under the law. (See Interpretation No. Yuan Tze 4). Likewise, he may only file a complaint against the adulterer on the doctrine of indivisibility of prosecution for offenses indictable only upon complaint, rather than bringing private prosecution." Likewise, this Yuan held in Interpretation No. Yuan Tze 1844, Section (3), the last sentence: "A initiates a private prosecution against his wife B for having committed adultery with C or jointly caused minor injury to him. A and B being married to each other, A is not allowed under Article 313 of the Code of Criminal Procedure to bring a private prosecution against B, and

on the doctrine of indivisibility of prosecution the private prosecution brought by A against C must of course also be denied." Consequently, the restriction on the people's right to bring private prosecution is expanded by the above cited authorities pursuant to the doctrine of indivisibility of prosecution.

The Code of Criminal Procedure provides in Article 239, first sentence: "In the case of an offense indictable only upon complaint, the filing or withdrawal of a criminal complaint against one of the joint offenders shall have the same effect as a filing or withdrawal of such complaint against all other joint offenders." This is the effect in personam of a criminal complaint for an offense indictable only upon complaint, also called subjective effect, i.e., the doctrine of indivisibility of prosecution referred to in the Interpretations and Precedents cited above. The so-called complaint, however, means a statement made by the injured party of a crime or any other person with the right to complain before an officer of the judicial authority in charge of the criminal invest-

刑事訴訟法第二百三十九條前段規定：「告訴乃論之罪，對於共犯之一人告訴或撤回告訴，其效力及於其他共犯」，此為就告訴乃論罪之告訴，對人之效力，又稱為主觀之效力，亦即上開解釋及判例所稱之告訴不可分原則。惟所謂告訴係由犯罪被害人或其他有告訴權之人，向刑事司法偵查機關人員陳述犯罪嫌疑事實，請求追訴嫌疑人，其乃偵查起因之一（同法第二百二十八條第一項），於告訴乃論罪案件，並為訴訟之條件，非經合法告訴，不得提起公訴及為實體判決（同法第二百五十二條第五款、第三百零三條第三款參照）；而自訴則係由犯罪被害人或其他有自訴權之人自任當事人之原告，對被告犯罪案件向法院起訴，請求審判，其性質與告訴有別，而與公訴相似；故同法第三百四十三條規定：「自訴程序，除本章有

tigation, on the facts of a suspected offense, for the purpose of demanding prosecution against the suspect. It is one of the causes leading to criminal investigation (Article 228, Paragraph 1, of the Code). In cases involving offenses indictable only upon complaint, a complaint is the prerequisite for commencement of an action, and neither a public prosecution may be instituted nor a substantive law judgment may be entered without a lawful complaint (See the Code, Article 252, Subparagraph 5 and Article 303, Subparagraph 3). Private prosecution, on the other hand, is a proceeding in which the injured party of a crime or any other person with the right to institute public prosecution, acting as a plaintiff by himself, files with the court a prosecution against the accused in a criminal case and demands a trial thereof. It is distinguishable from a complaint in nature and is similar to public prosecution. This is why Article 343 of the Code provides that "the provisions of Articles 246 and 249 and of Sections 2 and 3 in the preceding chapter with respect to public prosecution apply mutatis mutandis to procedures of private

特別規定外，準用第二百四十六條、第二百四十九條及前章第二節、第三節關於公訴之規定」，不惟不準用同法第二百三十九條告訴不可分原則，且自訴對人之效力（即主觀之效力）自應準用同法第二百六十六條「起訴之效力，不及於檢察官所指被告以外之人」之規定，亦即主觀上可分，從而同法第三百二十一條禁止人民對於配偶提起自訴之規定，自不應擴張解釋，使及於與其配偶共犯告訴乃論罪之人。況如夫妻之間為維持家庭和諧，不願對配偶進行追訴，在無法單獨對相姦人自訴之情形下，若提出告訴，依同法第二百三十九條前段之規定，其效力必及於其配偶，於人倫關係之維護，反有不利之影響。如必於告訴之後，再對配偶部分撤回告訴（同法第二百三十九條後段），以勉力維持婚姻關係，則亦有虛耗司法資源之虞。是上開解釋相關部分對人民自訴權之限制，並非為維持家庭和諧及人倫關係所必要，與憲法第二十三條規定之意旨不符，應予變更；最高法院二十九年上字第二三三三號判例前段及二十九年非字第一五號判例，對人民之自訴權增加法律所無之限制，應不再援用。

prosecution unless otherwise specifically set forth in this chapter." Not only is Article 239 relating to the doctrine of indivisibility of prosecution made inapplicable mutatis mutandis to private prosecution, but also the provision that "a prosecution shall not affect a person other than an accused inducted by the prosecutor" set forth in Article 266 of the Code shall naturally be made applicable mutatis mutandis to the effect in personam (i.e., subjective effect) of private prosecution. In other words, a private prosecution is divisible in subjectivity, and it follows apparently that the interpretation of Article 321 of the Code forbidding a person to bring private prosecution against his/her spouse should not be expanded to the extent of making it applicable to a person who has committed jointly with his/her spouse an offense indictable only upon complaint. A fortiori, if a person who, in light of maintaining a harmonious family life, being unwilling to initiate prosecution against his/her spouse, files a criminal complaint against the one committing adultery with his/her spouse because he/she is not legally permitted to bring a

private prosecution against the paramour alone, it will have the same effect as against his/her spouse under Article 239, the first sentence, of the Code, and will have even a worse impact on the maintenance of the ethical relationship. If he/she chooses, after bringing such a complaint, to withdraw the part of the complaint against his/her spouse (See Article 239, the last sentence, of the Code) in an effort to maintain the marital relationship, it will result in unnecessary waste of the judicial resources. Thus, we do not believe that the above-quoted interpretations, to the extent of restraining the right of action of the people, are necessary for maintaining harmonious family life and ethical relationships and we hold that said interpretations are inconsistent with the intention embodied in Article 23 of the Constitution and must be modified, and that the Supreme Court Precedents S. T. 2333 (Supreme Court, 1940), the first part and F. T. 15 (Supreme Court, 1940), which imposed on the right of action of the people restrictions that are not prescribed by law, must no longer be invoked as authorities.

Petitioner further alleges that the absence of provisions in the Criminal Code, Code of Criminal Procedure, and Civil Code with respect to the interruption of the period of limitation of criminal prosecution and the period of prescription of civil claims upon institution of a private criminal prosecution and a civil proceeding incidental to a criminal action, and of provisions therein that a case initiated upon a private prosecution, after being adjudged irrevocably to be not entertainable, shall be referred upon motion to the competent office of prosecutors; that the provisions of the Code of Criminal Procedure, Article 29; Article 31, Paragraph 1; Article 37, Paragraphs 1 and 2; and Article 404, setting forth excessive restrictions on the filing of interlocutory appeals; that the J. Y. Interpretation No. Yuan-je Tze 3889, and Articles 47 and 429 of the Code of Criminal Procedure, prohibiting a private prosecutor from inspecting court records and exhibits; and that the court, by its internal rules, having deprived the Petitioner of her right to carry out a voluntary investigation and deliberately refused to investigate the evidence to the advantage

另本件聲請人指摘：刑法、刑事訴訟法及民法未規定提起自訴及刑事附帶民事訴訟後，刑事追訴權時效及民事請求權時效期間中斷，亦未規定自訴不受理確定後，應依聲請移送該案於管轄之檢察署；刑事訴訟法第二十九條、第三十一條第一項、第三十七條第一項及第二項、第四百零四條不得抗告之範圍過廣；司法院院解字第三八八九號解釋、刑事訴訟法第四十七條及第四百二十九條，自訴人不得檢閱卷宗及證物之規定；及法院以內規剝奪聲請人主動調查權，且有利於聲請人之證據均故意不調查等，有牴觸憲法之疑義。查聲請人上開主張及其相關規定均非確定終局裁判所適用之法令，核與司法院大法官審理案件法第五條第一項第二款不合，依同條第三項規定，應不受理。此外，聲請人認台灣高等法院九十二年度上易字第四一五號刑事判決及同院九十二年度重附民上字第六號刑事附帶民事訴訟判決，適用最高法院七十九年台非字第一四七號刑事判決，對自訴為不受理判決；與台灣高等法院九十一年度上易字第三三八一號刑事判決及同院九十一年度重附民上字第七一號刑事附帶民事訴訟判決，適用台灣高等法院七十四年座談會結論，駁回其移轉管轄之聲請，有

of the Petitioner; have all given rise to suspicions of violation of the Constitution. We have noted, however, that the arguments made by the Petitioner above and the statutory provisions mentioned were not the laws applied by the court in its irrevocable final judgment, and that the elements required by the Constitutional Interpretation Procedure Acts, Article 5, Paragraph 1, Subparagraph 2, are not met. Thus, we are not in a position to take up these issues under Subparagraph 3 of the same Article. Furthermore, the Petitioner argues that Taiwan High Court criminal judgment S. Y. T. 415 (Taiwan High Court, 2003) and judgment C. F. M. S. T. 6 (Taiwan High Court, 2003) on the civil suit incidental to the criminal case, denying the private prosecution by relying on the Supreme Court criminal judgment T. F. T. 147 (Sup. Ct., 1990); and Taiwan High Court criminal judYgment S. Y. T. 3381 (Taiwan High Court, 2002) and judgment C. F. M. S. T. 71 (Taiwan High Court, 2002) on the civil suit incidental to the criminal case, denying the motion for change of venue by relying on the conclusion reached at a Taiwan High Court

違憲疑義。查最高法院判決與台灣高等法院座談會結論並非司法院大法官審理案件法所稱之法令，與司法院大法官審理案件法第五條第一項第二款不合，依同條第三項規定，亦應不受理，併此敘明。

symposium held during 1985, have raised an issue of constitutionality. It must be pointed out, however, that Supreme Court decisions and conclusions reached at Taiwan High Court symposiums are not laws or regulations referred to in the Constitutional Interpretation Procedure Act and do not meet the requirements of Article 5, Paragraph 1, Subparagraph 2, thereof. Thus, we are not in a position to take up this issue under Subparagraph 3 of the same Article.

Justice Tzu-Yi Lin filed concurring opinion.

Justice Young-Mou Lin filed concurring opinion in part and dissenting opinion in part.

本號解釋林大法官子儀提出協同意見書；林大法官永謀提出一部協同、一部不同意見書。

J. Y. Interpretation No.570（December 26, 2003）*

ISSUE: Are the provisions of the Toy Gun Control Act, as well as the public notice given by the Ministry of the Interior, in respect of the control of the toy guns, in violation of the Constitution?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）; J. Y. Interpretation No. 564（司法院釋字第五六四號解釋）; Articles 2 and 9, Subparagraph 1, of the Police Act（警察法第二條、第九條第一款）; Article 63, Paragraph 1, Subparagraph 8 of the Social Order Maintenance Act（社會秩序維護法第六十三條第一項第八款）; Article 174-1 of the Administrative Procedure Act（行政程序法第一百七十四條之一）; Article 8-1 of the Regulation Governing Toy Guns（玩具槍管理規則第八條之一）; Ministry of the Interior by Announcement Tai (82) Nei-Jing-Tze No.8270020 (January 15, 1993)（內政部八十二年一月十五日台（八二）內警字第八二七〇〇二〇號公告）.

KEYWORDS:

authorized by legislative law（由法律授權）, promulgated jointly（會銜發布）, public announcement（公告）, restriction on the people's freedoms and rights（人民自由及權利之限制）, principle of legal reservation（法律保留原則）, po-

* Translated by David Yang and Charles Hung of Baker & Mckenzie Law Offices, Taipei.

** Contents within frame, not part of the original text, are added for reference purpose only.

lice administrative ordinances（警察命令）, definition and allocation of authority and duty（劃定職權與管轄事務）, function of behavioral law（行為法之功能）, administrative agency（行政機關）, governing authority（主管機關）.**

HOLDING: According to Article 23 of the Constitution, any restriction on the people's freedoms and rights should be regulated under legislative law. If it is authorized by legislative law to issue orders as supplemental regulations, the purpose, content and scope of the authorization should be specific and definite.

解釋文：人民自由及權利之限制，依憲法第二十三條規定，應以法律定之。其得由法律授權以命令為補充規定者，則授權之目的、內容及範圍應具體明確，始得據以發布命令。

Article 8-1 of the Regulation Governing Toy Guns (repealed) amended and promulgated jointly by the Ministry of Economic Affairs and the Ministry of the Interior on December 18, 1992, provides that: "toy guns that are similar to real guns and that may jeopardize public security shall be forbidden by public announcement of the Ministry of Economic Affairs." Thus, the Ministry of the Interior by Announcement Tai (82) Nei-Jing-Tze No.8270020 (January 15, 1993) (re-

中華民國八十一年十二月十八日經濟部及內政部會銜修正發布之玩具槍管理規則（已廢止），其第八條之一規定：「玩具槍類似真槍而有危害治安之虞者，由內政部公告禁止之」。內政部乃於八十二年一月十五日發布台（八二）內警字第八二七〇〇二〇號公告（已停止適用）：「一、為維護公共秩序，確保社會安寧，保障人民生命財產安全，自公告日起，未經許可不得製造、運輸、販賣、攜帶或公然陳列類似真槍之玩具槍枝，如有違反者，依社會

pealed) stipulated that "in order to maintain public order, to ensure social stability and to protect the safety of the people and property, from the date of this announcement, any person who manufactures, transports, sells, possesses, or publicly displays toy guns which are similar to real guns without permission shall be punished according to the relevant provisions of the Social Order Maintenance Act." Though the order mentioned above issued by the Ministry of the Interior is officially necessary for practical purposes, the prohibition against the manufacture, transportation, sale, possession, or public display of toy guns which are similar to real guns and the punishment of the violators is a restriction of the people's freedoms and rights and it should be regulated by legislative law or by orders authorized explicitly by legislative law. The above mentioned order was not authorized by legislative law and has had a negative impact on the freedoms and the rights of the people. It is contrary to the principle of legal reservation of Article 23 of the Constitution and should no longer apply.

秩序維護法有關條文處罰」，均係主管機關基於職權所發布之命令，固有其實際需要，惟禁止製造、運輸、販賣、攜帶或公然陳列類似真槍之玩具槍枝，並對違反者予以處罰，涉及人民自由權利之限制，應由法律或經法律明確授權之命令規定。上開職權命令未經法律授權，限制人民之自由權利，其影響又非屬輕微，與憲法第二十三條規定之法律保留原則不符，均應不予適用。

REASONING: According to Article 23 of the Constitution, any restriction on the people's freedoms and rights should be regulated by legislative law. If it is authorized by legislative law to issue orders as supplemental regulations, the purpose, content and scope of the authorization should be specific and definite in order to comply with the constitutional objective of protecting the people's freedoms and rights.

解釋理由書：人民自由及權利之限制，依憲法第二十三條規定，應以法律定之。得由法律授權以命令為補充規定者，其授權之目的、內容及範圍應具體明確，始得據以發布命令，以符合憲法保障人民自由權利之本旨。

The Ministry of the Interior is the central government branch with authority over the police, and according to Article 2 and Article 9, Subparagraph 1, of the Police Act, it has the authority to promulgate police administrative ordinances. However, if a police administrative ordinance is related to any restriction on the people's freedoms and rights, it should also be bound by the principle of legal reservation as mentioned above. Article 2 of the Police Act which provides that: "the duty of a policeman is to maintain public order, to protect people, to prevent all kinds of infringement, and to advance people's welfare," and Article 9, Subparagraph 1, of

內政部為中央警察主管機關，依警察法第二條暨第九條第一款規定，固得依法行使職權發布警察命令。然警察命令內容涉及人民自由權利者，亦應受前開法律保留原則之拘束。警察法第二條規定，警察任務為依法維持公共秩序，保護社會安全，防止一切危害，促進人民福利；同法第九條第一款規定，警察有依法發布警察命令之職權，僅具組織法之劃定職權與管轄事務之性質，欠缺行為法之功能，不足以作為發布限制人民自由及權利之警察命令之授權依據。

the same law which provides that: "the police have the authority to promulgate police administrative ordinances," are provisions regarding the definition and allocation of the authority and duty of policemen under organizational law but not regarding the function of behavioral law. Therefore, those provisions do not provide legal foundation or authorization for the police authority to issue administrative ordinances to restrict the people's freedoms and rights.

Where an announcement of an administrative agency imposes restraint on the people's freedom, the requirements and standards of such announcement must be specifically and clearly prescribed by law. The foregoing has been explained in J. Y. Interpretation No. 564. Though Article 63, Paragraph 1, Subparagraph 8, of the Social Order Maintenance Act provides that: "A person who manufactures, transports, sells, possesses, or publicly displays weapons prohibited by an announcement of the governing authority shall be punished with a detention of not more than 3 days or a fine of not more

行政機關之公告行為，如對人民之自由權利有所限制時，應以法律就該公告行為之要件及標準，具體明確規定，本院釋字第五六四號解釋足資參照。社會秩序維護法第六十三條第一項第八款固規定，製造、運輸、販賣、攜帶或公然陳列經主管機關公告查禁之器械者，處三日以下拘留或新台幣三萬元以下罰鍰。惟該條款所謂「經主管機關公告」，係指主管機關，依據對該公告行為之要件及標準為具體明確規定之法律，所為適法之公告而言，尚不得以該條款規定，作為發布限制人民自由權利公告之授權依據。

than NT$30000," the so-called 'by an announcement of the governing authority' shall mean an announcement made according to law that has specifically and clearly prescribed the requirements and standards of the announcement. It should not be taken that the provision per se provides the basis of the authorization to make an announcement restricting the people's freedoms and rights.

Article 8-1 of the Regulation Governing Toy Guns (repealed) amended and promulgated jointly by the Ministry of the Interior Directive Tai (82) Nei-Jing-Tze No.8190093 and the Ministry of Economic Affairs Directive Jing (81) Shang-Tze No.235625 on December 18, 1992 (repealed jointly by the Ministry of the Interior Directive Nei-Jing-Tze No.0910075691 and the Ministry of Economic Affairs Directive Shang-Tze No.09002269260 on May 8, 2002) provides that: "toy guns that are similar to real guns and that are likely to jeopardize public security shall be forbidden by public announcement made by the Ministry of Economic Affairs." Thus, pursuant to Ar-

中華民國八十一年十二月十八日經濟部經（八一）商字第二三五六二五號、內政部台（八一）內警字第八一九〇〇九三號令會銜修正發布玩具槍管理規則（九十一年五月八日經經濟部經商字第〇九〇〇二二六九二六〇號與內政部台內警字第〇九一〇〇七五六九七號令會銜發布廢止），其第八條之一規定：「玩具槍類似真槍而有危害治安之虞者，由內政部公告禁止之」。內政部乃於八十二年一月十五日依據警察法第二條及第九條第一款、玩具槍管理規則第八條之一，發布台（八二）內警字第八二七〇〇二〇號公告（自九十一年五月十日起停止適用）：「一、為維護公共秩序，確保社會安寧，保障人民生命財產安全，自公告日起，未經許可不得

ticle 2 and Article 9, Subparagraph 1, of the Police Act and Article 8-1 of the Regulation Governing Toy Guns, the Ministry of the Interior by Directive Tai (82) Nei-Jing-Tze No.8270020 of January 15, 1993 (repealed on May 10, 2002) stipulated that ‘’1. in order to maintain public order, to ensure social stability and to protect the safety of the people and property, from the date of this announcement, any person who manufactures, transports, sells, possesses, or publicly displays any toy guns which are similar to real guns without permission shall be punished according to the relevant provisions of the Social Order Maintenance Act.” Though the order mentioned above was issued by the Ministry of the Interior as the authority in charge of the police to maintain public security and is necessary for practical purposes since the relevant law and system is not fully developed, the prohibition against the manufacture, transportation, sale, possession, or public display of toy guns which are similar to real guns and the punishment of violators are related to the restriction of the people’s freedoms and rights and should be

製造、運輸、販賣、攜帶或公然陳列類似真槍之玩具槍枝，如有違反者，依社會秩序維護法有關條文處罰」，係主管機關為維護社會治安，於法制未臻完備之際，基於警察職權所發布之命令，固有其實際需要，惟禁止製造、運輸、販賣、攜帶或公然陳列類似真槍之玩具槍枝，並對違反者予以處罰，涉及人民自由權利之限制，且其影響非屬輕微，應由法律或經法律授權之命令規定，始得為之。警察法第二條及第九條第一款、社會秩序維護法第六十三條第一項第八款規定，均不足以作為上開職權命令之授權依據，已如前述。又八十九年十二月二十七日增訂、九十年十二月二十八日修正公布之行政程序法第一百七十四條之一規定，乃基於法安定性原則所訂定之過渡條款，縱可作為該法施行前須以法律規定或以法律明列其授權依據訂定之事項，行政機關以職權命令訂定者，於該法施行後二年內繼續有效之法律依據，惟此一不涉及適法與否之效力存續規定，尚不得作為相關職權命令之概括授權法律，且本件行為時及裁判時，行政程序法尚未公布施行，故不發生該法第一百七十四條之一規定，對於系爭玩具槍管理規則及內政部台（八二）內警字第八二七〇〇二〇號公告之

regulated by legislative law or orders authorized explicitly by legislative law. The order issued by the police authority to limit the freedoms and rights of the people as mentioned in the above is not authorized by legislative law and has had negative impact on the freedoms and rights of the people; hence, they should be regulated only by legislative law or administrative ordinance authorized by legislative law. Article 2 and Article 9, Subparagraph 1, of the Police Act, and Article 63, Paragraph 1, Subparagraph 8, of the Social Order Maintenance Act can not serve as the legal foundation and authority of the orders. Article 174-1 of the Administrative Procedure Act, augmented on December 27, 2000, and amended and promulgated on December 28, 2001, is a sunset clause that provides that "matters that should have been regulated by law or by orders authorized by law but are regulated by administrative orders shall, for the stability of law, remain valid for two years after the coming into force of that law." This provision, however, can not be deemed as a broad legal authorization of administrative orders. Furthermore, the

效力有何影響之問題。綜上所述，上開職權命令未經法律授權，限制人民之自由權利，其影響又非屬輕微，與憲法第二十三條規定之法律保留原則不符，均應不予適用。

police orders under discussion were implemented prior to the promulgation of the Administrative Procedure Act. Therefore, there is no legal issue regarding the applicability of Article 174-1 of the Administrative Procedure Act as to the effectiveness of the Regulation Governing Toy Guns and the Directive Tai (82) Nei-Jing-Tze No. 8270020 of the Ministry of the Interior. In conclusion, the orders issued by the police authority which restrict the freedoms and rights of the people mentioned in the above are not authorized by legislative law, have had negative impact on the freedoms and rights of the people, are contrary to the principle of legal reservation clause of Article 23 of the Constitution and should be considered null and void [or must no longer apply].

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